EDITOR'S NOTE

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91-1007

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CURTIS W. CAINE, JR., M.D., - - - - *Petitioner*

versus

M.D. HARDY, M.D., WOODIE L. MASON, M.D., JAMES STRONG, M.D., FRANK HOWELL, M.D., W.J. PATTERSON, M.D., GEORGE SMITH-VANIZ, M.D., H. D. BROCK, M.D., RICKY RUSSELL, M.D., JAMES MCILWAIN, M.D., DON BUTTS, M.D., D. I. CARLSON, M.D., JOHN COURTNEY, M.D., ROBERT STRONG, M.D., DARILYNN WILSON, M.D., as members of the Executive Committee and or the two (2) *Ad Hoc* Anesthesia Department Investigating Committees of the Medical Staff of Hinds General Hospital, a hospital erected, owned and operated under Sections 41-13-15 to 41-13-51 of the Statutes of the State of Mississippi by the County of Hinds, Mississippi; and CECIL J. JAQUITH, DOROTHY WILLIAMS, JERRY N. BLAKENEY, BRUCE DEVINEY, F. O. WOODWARD, LINDA RAFF and GLEN HOLMES, as Trustees of Hinds General Hospital appointed pursuant to Section 41-13-29 of the Statutes of the State of Mississippi, ROBERT G. WILSON as Administrator of Hinds General Hospital, and HINDS GENERAL HOSPITAL, a hospital erected, owned and operated under Sections 41-13-15 to 41-13-51 of the Statutes of the State of Mississippi, by the County of Hinds, State of Mississippi - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in reviewing a District Court's dismissal of a Complaint and a proposed Amendment thereto alleging violations of the Fifth, Fourteenth and First Amendments to the United States Constitution and 42 U.S.C. §1983, a Court of Appeals, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, may rely on unsworn materials outside of a Complaint and accept factual arguments raised by defendants on appeal (although never raised before the District Court) without affording plaintiff an opportunity to contest the facts assumed.

2. Whether, under Rule 15(a) of the Federal Rules of Civil Procedure, a federal District Court and a Court of Appeals may dismiss a proposed Amended Complaint alleging violations of the First Amendment to the United States Constitution and 42 U.S.C. § 1983 where the defendants never filed a responsive pleading to the plaintiff's initial Complaint.

3. Whether, as a matter of law, there can be no violation of 42 U.S.C. § 1983 and the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution where a physician alleges that his medical staff privileges at a public hospital were suspended and revoked without adequate notice and an opportunity to be heard before unbiased decisionmakers in violation of specific provisions of the Medical Staff Bylaws, Rules and Regulations of the public hospital and the Health Care Quality Improvement Act of 1986, 42 U.S.C. §11112, *et seq.*, **in both the pre-deprivation and post-deprivation appeals processes** simply because Mississippi law gives the physician the right to appeal the suspension and revocation of his medical staff privileges to Mississippi Chancery Court.

PARTIES TO THE PROCEEDING

All the parties to the proceeding in the Court whose judgment is sought to be reviewed are named in the caption of this Petition as filed in this Court.

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IN THE

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No. _____

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, CURTIS W. CAINE, JR., M.D., respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on September 26, 1991. This Petition is filed within ninety (90) days of the entry of the Opinion and Judgment below.

OPINIONS BELOW

The Opinion and Judgment of the United States District Court for the Southern District of Mississippi, Jackson Division, entered June 14, 1989, reported at 715 F. Supp. 166, is reprinted in the Appendix to this Petition, at pages 62a through 73a. The Opinion of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered June 27, 1990, reported at 905 F.2d 858, is reprinted in the Appendix at pages 41a through 61a. The Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, entered September 26, 1991, reported at —— F.2d ——, is reprinted in the Appendix at pages 1a through 37a.

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND FEDERAL STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States and federal statutory provisions and Federal Rules of Civil Procedure:

The Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life of limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment. Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The First Amendment

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title 42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable

exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rule of Civil Procedure 12(b)

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Federal Rule of Civil Procedure 15(a)

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may

so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

STATEMENT OF THE CASE

I. How the Federal Questions Were Presented

The Federal Constitutional questions involved in the within case were first presented in Petitioner's Complaint for Declaration of Rights and Damages filed pursuant to 42 U.S.C. § 1983, 42 U.S.C. § 11112, *et seq.*, 28 U.S.C. § 1343, 28 U.S.C. § 2201, and Rule 57 of the Federal Rules of Civil Procedure on February 10, 1989, in the United States District Court for the Southern District of Mississippi, Jackson Division. The aforementioned Complaint for Declaration of Rights and Damages states, *inter alia*, as follows:

> 1. This action arises under the Constitution of the United States of America, particularly under the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States of America, and under federal law, particularly Title 42 of the United States Code, Section 1983, and Title 42 of the United States Code, Section 11112 *et seq.* Plaintiff seeks a declaration of rights that the acts of the Defendants set forth herein were violative of the Fifth and Fourteenth Amendments to the Constitution of the United States, Title 42 of the United States Code, Section 1983, and Title 42 of the United States Code, Section 11112, pursuant to Rule 57 of the Federal Rules of Civil Procedure and Title 28 of the United States Code,

> Section 2201, and Plaintiff further seeks compensatory and punitive and exemplary damages.
>
> 2. This Court has jurisdiction of this cause under and by virtue of Title 28 of the United States Code, Section 1343. Venue is proper in this the Southern District of Mississippi, Jackson Division, pursuant to Title 28 of the United States Code, Section 1391(e), in that all of the parties reside in said district and division, and the cause of action arose therein.

(Rec. Doc. 1; Complaint)

Petitioner, CURTIS W. CAINE, JR., M.D., (sometimes referred to hereinafter as "Dr. Caine") plead that he was a practicing physician licensed by the State of Mississippi and specializing in anesthesiology. (Rec. Doc. 1; Complaint) The Respondents herein are Hinds General Hospital, a Mississippi community hospital and local government institution established pursuant to *Miss. Code Ann.* § 41-13-15, *et seq.* (hereinafter referred to as "Hinds General"), members of its Board of Trustees, members of the Hinds General Medical Staff Executive Committee, members of certain Medical Staff *ad hoc* committees, and the administrator of Hinds General Hospital. (Rec. Doc. 1; Complaint)

Petitioner plead, *inter alia,* that his medical staff privileges in anesthesiology constituted a property interest protected by the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution; that Respondents were acting "under the color and pretense of the statutes, ordinances, regulations, customs, and usages of the County of Hinds and the State of Mississippi"; that the Respondents suspended and then revoked the Petitioner's medical staff privileges in anesthesiology in violation of the Medical Staff Bylaws, the Rules and Regulations of Hinds General Hospital, the Due Process Clauses

of the Fifth and Fourteenth Amendments to the United States Constitution, and the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11112, *et seq.*; and that the actions of the Respondents as set out in the Complaint were performed wantonly, wilfully and maliciously, with the intent to undermine and destroy the Petitioner's practice of anesthesiology and medicine. (Rec. Doc. 1; Complaint) Petitioner plead the specific facts of the case with particularity as set forth below, and prayed for the relevant declaratory relief, and compensatory, exemplary, and punitive damages. (Rec. Doc. 1; Complaint)

II. Statement of Facts

In 1983, Dr. Caine was granted active medical staff privileges in anesthesiology at Hinds General Hospital, a Mississippi community hospital and local government institution established pursuant to *Miss. Code Ann.* § 41-13-15, *et. seq.*. (Rec. Doc. 1; Complaint) Every two (2) years thereafter, Dr. Caine reapplied for and was granted his reapplications for medical staff privileges at Hinds General pursuant to the Bylaws, Rules and Regulations of Hinds General Hospital and the Hinds General Medical Staff. (Rec. Doc. 1; Complaint)

In 1987 and 1988, the Respondents, M.D. Hardy, M.D., Robert Strong, M.D., and Darilynn Wilson, M.D. (sometimes referred to hereinafter as "Hardy", "Strong" and "D. Wilson", respectively) sought an exclusive contract for their partnership to perform anesthesia services at Hinds General to which Dr. Caine and others strongly objected. (Rec. Doc. 1; Complaint) In 1988 Dr. Caine opposed Dr. Hardy in a hotly-contested race for the Chairmanship of the Department of Anesthesiology, but lost by one vote. (Rec. Doc. 1; Complaint)

By the end of March, 1988, Drs. Hardy, Strong and D. Wilson had not been able to secure their proposed exclusive anesthesia contract with Hinds General due largely to the objections of Dr. Caine. (Rec. Doc. 1; Complaint) Drs. Hardy and Strong thereupon approached members of the medical staff, and maliciously made false and derogatory remarks about Dr. Caine and his practice with the intent to injure and destory his medical practice and professional standing at Hinds General. (Rec. Doc. 1; Complaint) Hardy and Strong made numerous statements of their intent to revoke Dr. Caine's staff privileges. (Rec. Doc. 1; Complaint)

In his fifty-page Complaint, Petitioner alleged that the Respondents herein summarily suspended and then revoked his medical staff privileges in anesthesiology at Hinds General Hospital without providing him a pre-deprivation hearing before unbiased decisionmakers and without providing him adequate notice of the "charges" against him and a meaningful opportunity to refute the "charges," in violation of the Hinds General Medical Staff Bylaws, Rules and Regulations, the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11112 *et seq.*, the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983. (Rec. Doc. 1; Complaint) Additionally, Petitioner alleged that Respondents failed to provide him with adequate notice of the "charges" against him and a meaningful opportunity to be heard before unbiased decisionmakers **following** the summary suspension of his medical staff privileges and **before** the total revocation of his medical staff privileges, in violation of the Hinds General Medical Staff Bylaws, Rules and Regulations, the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11112, *et seq.*, the Due Process

Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983. (Rec. Doc. 1; Complaint) Finally, and most importantly, Petitioner alleged that the detailed scrutiny of and investigation into his anesthesiology practice, the initial summary suspension of his medical staff privileges, and the subsequent revocation of his medical staff privileges were motivated by a personal vendetta against him and not by any alleged interest in preventing a threat to patient safety, imminent or otherwise, in violation of the Hinds General Medical Staff Bylaws, Rules and Regulations, the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11112, *et seq.*, the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983. (Rec. Doc. 1; Complaint)

Specifically, Petitioner alleged that it was his vocal opposition to the proposed exclusive anesthesia contract of Respondents, M.D. Hardy, M.D., Darilynn Wilson, M.D. and Robert Strong, M.D., as well as his opposition to Respondent, M.D. Hardy, M.D., for the Chairmanship of the Department of Anesthesiology of Hinds General Hospital, which were the motivating factors behind the overly-zealous investigation into his anesthesiology practice, the summary suspension of his medical staff privileges, the total revocation of his medical staff privileges, and the consequent destruction of his medical practice. (Rec. Doc. 1; Complaint) Respondents, M.D. Hardy, M.D. and Robert Strong, M.D., served on the first *Ad Hoc* Investigating Committee which began procedures to suspend Petitioner's medical staff privileges. This first *Ad Hoc* Investigating Committee failed to give Petitioner any notice of the alleged "charges" against him and a hearing before recommending to the Executive Committee that his medical staff pri-

vileges be summarily suspended. (Rec. Doc. 1; Complaint) The Executive Committee, of which Hardy and one of his partners were members, summarily suspended Petitioner's medical staff privileges on the basis of this recommendation without giving Petitioner notice of the alleged "charges" against him and a hearing. (Rec. Doc. 1; Complaint) Before the Petitioner was to appear before the Executive Committee to contest the summary suspension of his medical staff privileges, Respondent, M.D. Hardy, M.D., took it upon himself to review cases over the preceding six years of Petitioner's practice, despite the fact that those cases had been favorably reviewed in prior years for purposes of the renewal of Petitioner's medical staff privileges. (Rec. Doc. 1; Complaint) Prior to the Executive Committee hearing, and completely outside the hearing of Petitioner, Hardy requested that the Executive Committee initiate another investigation into Petitioner's practice based on his evaluation of twenty-two patient charts which were uncovered in his own personal investigation. (Rec. Doc. 1; Complaint) A second *Ad Hoc* Investigating Committee was then formed to further scrutinize Petitioner's practice. (Rec. Doc. 1; Complaint) This second *Ad Hoc* Investigating Committee was composed of Respondents, D.I. Carlson, M.D., Robert Strong, M.D. and Darilynn Wilson, M.D.. Robert Strong, M.D. and Darilynn Wilson, M.D., were members of the partnership with Dr. Hardy that had sought an exclusive anesthesiology contract at Hinds General to which Petitioner had been vocally opposed. (Rec. Doc. 1; Complaint) Dr. Strong had also joined Dr. Hardy in initiating the first investigation of Petitioner's practice. (Rec. Doc. 1; Complaint) Darilynn Wilson, M.D. was not only a partner of Drs. Hardy and Strong and

thus a strong proponent of the exclusive contract, but was also the wife of Dr. Hardy. (Rec. Doc. 1; Complaint)

This second *Ad Hoc* Investigating Committee, despite the fact that Petitioner was already under a summary suspension, failed to give Petitioner any notice whatsoever of the new alleged "charges" against him and any opportunity to prepare a response to any of the alleged "charges." (Rec. Doc. 1; Complaint) Further, Petitioner was even denied access to the twenty-two (22) patient charts which formed the basis of the new "charges" even after Petitioner had requested access to them before appearing before the second *Ad Hoc* Investigating Committee. (Rec. Doc. 1; Complaint) The second *Ad Hoc* Investigating Committee then voted to revoke Petitioner's medical staff privileges and transmitted this recommendation to the Executive Committee. (Rec. Doc. 1; Complaint) Despite the fact that Petitioner was already under a summary suspension, the Executive Committee voted to revoke Petitioner's medical staff privileges on the basis of the determination of the second *Ad Hoc* Investigating Committee without giving Petitioner notice of the alleged new "charges" against him, access to patient charts, and a hearing. (Rec. Doc. 1; Complaint) When Petitioner attempted to appeal both the summary suspension and total revocation of his medical staff privileges to an intra-hospital hearing committee, Respondents Hardy and Strong, other members of the two (2) *Ad Hoc* Investigating Committees, and various members of the Executive Committee repeatedly approached, and made statements to, this intra-hospital hearing committee in order to taint the hearing. (Rec. Doc. 1; Complaint) After requesting and being denied a hearing before unbiased, outside physicians to contest the summary suspension and revocation of his

medical staff privileges, Petitioner brought the instant action in United States District Court. (Rec. Dec. 1; Complaint) As a direct and proximate result of the actions of the Respondents and the reporting requirements for hospital peer review determinations, Petitioner was denied medical staff privileges in other hospitals and medical licensure in Mississippi and other states. (Rec. Doc. 1; Complaint)[1]

III. Proceedings Below

On February 10, 1989, Petitioner filed a Complaint in the United States District Court for the Southern District of Mississippi, Jackson Division, seeking a Declaration of Rights and Damages under 42 U.S.C. § 1983 for the wrongful suspension and revocation of his medical staff privileges at Hinds General Hospital. The Respondents did not file an Answer to the Complaint. On February 24, 1989, Respondents filed a motion to dismiss or, in the alternative, for summary judgment. On March 15, 1989, Petitioner filed a motion for leave to amend his original complaint to allege that the actions of the Respondents violated his right to free speech under the First Amendment to the United States Constitution. Petitioner's motion for leave to amend his original complaint was granted by the District Court in an Order dated March 17, 1989.

The Respondents and the District Court treated Respondents' motion as a motion to dismiss under Rule

[1]All of the due process violations enumerated in the Complaint were plead as violations of the provisions of Articles VI and VII of the Medical Staff Bylaws, Rules and Regulations of Hinds General Hospital, the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11112 *et seq.*, as well as 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments to the United States Constitution.

12(b)(6) of the Federal Rules of Civil Procedure. The District Court, by Opinion and Judgment dated June 14, 1989, granted the Respondents' motion to dismiss and reversed its March 17, 1989 Order and denied Petitioner leave to amend his Complaint to allege that the actions of the Respondents violated his right to free speech under the First Amendment to the United States Constitution.

On June 27, 1990, the majority of a three-judge panel of the United States Court of Appeals for the Fifth Circuit entered an Opinion reversing the Opinion and Judgment of the District Court, and remanding the case to said court for proceedings.

By Order dated August 3, 1990, the United States Court of Appeals for the Fifth Circuit, fourteen active judges sitting, ordered that the case be reheard *en banc*. Following the submission of supplemental briefs by Petitioner and Respondents, and after the case was reargued *en banc*, Petitioner, Curtis W. Caine, Jr., M.D., died of a heart attack. Petitioner's counsel moved to revive the action in the name of Petitioner's personal representative. On September 26, 1991, a majority of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, entered an Opinion affirming the Opinion and Judgment of the District Court. The majority of the *en banc* court held that Petitioner's cause of action under 42 U.S.C. § 1983 survives his death, and that therefore the case was not moot. The majority of the *en banc* court then held that Petitioner failed to state a claim for violation of his right to procedural due process under the Fourteenth Amendment to the United States Constitution and that the District Court properly denied Petitioner's amendment of his Complaint to add a First Amendment claim. Finding that the suspension of Petitioner's medical staff privileges

was under exigent circumstances and was necessary to protect hospital patients (although such was not plead in the Complaint), the *en banc* court held that Petitioner was not entitled to a presuspension hearing, and that Petitioner had adequate postdeprivation remedies. The majority of the *en banc* court then held that the alleged conduct of the Respondents was "random and unauthorized" and that there existed an adequate post-deprivation remedy, and that therefore the decisions of this Honorable Court in *Parratt* v. *Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 69 L.Ed.2d 240 (1981) and *Hudson* v. *Palmer,* 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) precluded Petitioner from maintaining an action for violation of his rights to procedural due process under the Fourteenth Amendment to the United States Constitution.

Finally, the majority of the *en banc* court concluded that Petitioner failed to state a claim for violation of his right to free speech under the First Amendment to the United States Constitution because Petitioner's alleged speech did not express matters of "public concern".

REASONS FOR GRANTING THE WRIT

I. In Affirming the District Court's Dismissal of Petitioner's Complaint, the Court of Appeals Ignored the Clear Dictates of Federal Rules of Civil Procedure 12(b) and 15(a) so as to Call for an Exercise of This Honorable Court's Power of Supervision.

The Respondents never filed an Answer to the Complaint. Rather, they filed a Motion to Dismiss or in the Alternative For Summary Judgment. Both the Respondents and the District Court treated the Motion as a Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Respondents did not submit to the District Court any other documents, sworn or otherwise,

outside the Complaint, and the District Court did not consider any documents outside the Complaint. Before the District Court the Respondents maintained that Petitioner failed to allege a cause of action for violations of the Due Process Clauses of the Fifth and Fourteenth Admendment because the alleged actions of the Respondents were "random and unauthorized" and that Petitioner could have challenged the suspension and subsequent revocation of his medical staff privileges in Mississippi Chancery Court pursuant to *Miss. Code Ann.* § 73-25-27. The Respondents did not claim or submit any evidence contending that there existed any exigent circumstances or any imminent threat to patient safety justifying the summary suspension of Petitioner's medical staff privileges without notice of charges against him and a hearing.

After the Respondents filed their Motion to Dismiss, Petitioner moved for leave to file a tendered first amended complaint to add a claim for the violation of his right to free speech under the First Amendment to the United States Constitution. The District Court initially granted Petitioner's motion. The Respondents thereafter filed a supplement to their Motion to Dismiss, asserting that Petitioner failed to state a claim for violation of his rights under the First Amendment to the United States Constitution because Petitioner's alleged speech did not involve matters of public concern. Again, the Respondents did not submit any other documents, sworn or otherwise, and the District Court did not consider any documents outside of the Complaint.

The District Court granted Respondent's Motion to Dismiss, holding that because Petitioner had an adequate post-deprivation remedy in Mississippi Chancery Court under state law, Petitioner failed to state a claim for vio-

lation of his rights to procedural due process under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. As to Petitioner's First Amendment claim, the District Court concluded: "Finding that the Amended Complaint fails to state a claim upon which relief can be granted, the Court exercises its discretion pursuant to Federal Rules of Civil Procedure 15(a) to deny Caine's Motion for Leave to Amend Complaint."

It must be noted that **nowhere** in the Opinion of the District Court can one find the terms "exigent circumstances," "imminent danger to patients," or "patient safety." The reason for such a glaring omission is obvious: the Respondents never raised the issue, and there is no evidence in the record to illustrate that any "exigent circumstances" existed which would justify the suspension of Petitioner's medical staff privileges without notice and an opportunity to be heard. Before the United States Court of Appeals for the Fifth Circuit, the Respondents for the first time argued that Petitioner was summarily suspended under "exigent circumstances" in order to prevent an alleged imminent threat to patient safety even though there was no sworn evidence in the record to support such a contention.

The allegations contained in Petitioner's voluminous Complaint negate such "exigent circumstances" as a justification for any summary suspension. The dispute between Petitioner and Respondents began when Respondent, M.D. Hardy, M.D., and his anesthesiology partnership sought an exclusive contract to provide anesthesia services at Respondent Hinds General Hospital. Petitioner vocally opposed the exclusive contract and was instrumental in preventing Hardy and his partners from gaining the exclusive contract. Subsequently, Petitioner ran against Respond-

ent, M.D. Hardy, M.D., for the Chairmanship of the Hinds General Department of Anesthesiology in a hotly-contested election and lost by only one vote. Shortly thereafter, Respondent, M.D. Hardy, M.D., and his partners set out on a campaign to remove Petitioner from the medical staff of Hinds General Hospital.

Respondent, M.D. Hardy, M.D., and one of his partners served on the first *Ad Hoc* Investigating Committee which took the initial steps to suspend Petitioner's medical staff privileges. Thus, the first *Ad Hoc* Investigating Committee was clearly biased against Petitioner, and it overtly breached the hospital's Bylaws, Rules and Regulations. Further, it failed to give Petitioner the required notice of the charges against him and a hearing before impartial decisionmakers. The first *Ad Hoc* Investigating Committee nonetheless proceeded to recommend that the Executive Committee of the Medical staff suspend Petitioner's medical staff privileges. The Executive Committee, of which Respondent, M.D. Hardy, M.D., and one of his partners were members, upheld the recommendation of the first *Ad Hoc* Investigating Committee. The Executive Committee failed to give Petitioner notice of the charges against him and a hearing before imposing the summary suspension in violation of the Medical Staff Bylaws, Rules and Regulations. Finally, before Petitioner appeared before the Executive Committee to challenge the summary suspension, Respondent, M.D. Hardy, M.D., completely outside the hearing of Petitioner, requested that the Executive Committee initiate another investigation into Petitioner's anesthesiology practice based on twenty-two (22) patient charts which he had uncovered in his own personal investigation of Petitioner's practice. The Executive Committee voted to summarily suspend Petitioner's medical staff privileges

after Respondent, M.D. Hardy, M.D., had revealed his twenty-two (22) newly discovered "charges" against Petitioner. At no time leading up to the complete revocation of Petitioner's medical staff privileges was Petitioner ever given access to the twenty-two (22) patient charts which had been unearthed by Respondent, M.D. Hardy, M.D., and which formed the basis for the complete revocation of Petitioner's medical staff privileges, despite Petitioner's request for such access.

The majority of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, cavalierly concluded that the Petitioner's fifty-page Complaint set forth only "conclusory" allegations of bias, and that since Petitioner's medical staff privileges were suspended under "exigent circumstances" to protect against an alleged imminent threat to patient safety, Petitioner's Due Process rights under the Fifth and Fourteenth Amendments to the United States Constitution were not violated. The *en banc* Court of Appeals totally ignored the extensive allegations of Petitioner's Complaint which describe in detail the lack of proper notice of charges and hearings **both before and after** the summary suspension of Petitioner's medical staff privileges and **before** the total revocation of Petitioner's medical staff privileges. As a matter of basic federal practice and procedure, such was manifest error.

There can be no doubt that the majority of the *en banc* Court of Appeals, at the behest of the Respondents, ignored both the substance of the Petitioner's Complaint and the well-established law of Rule 12(b)(6) of the Federal Rules of Civil Procedure when it concluded that "[i]n form, the hospital followed every step of its medical staff bylaws both before and after Dr. Caine's suspension." Indeed, when one considers the fact that the Respondents

never raised the "emergency" rationale for Petitioner's summary suspension before the District Court, and that the District Court did not consider any other material except Petitioner's Complaint, it is manifest that procedural irregularities, which are the subject of Petitioner's Complaint, continued even in the federal courts.

It is well established that on a Rule 12(b)(6) motion, all of the allegations of the Petitioner's Complaint must be accepted as true and must be construed in a light most favorable to the Petitioner. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1363, at 460-61 (1990). Thus, a complaint must not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); *see also, Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). Most importantly, a motion to dismiss under Rule 12(b) is not the place for defendants to make factual arguments to induce a conclusion contrary to that of the plaintiff as alleged in the complaint, as a Rule 12(b) motion tests only the legal sufficiency of the complaint. Fact issues are simply not decided on a motion to dismiss a complaint. Thus, on a defendant's motion to dismiss, a federal court cannot accept as facts or take judicial notice of facts which lead to a dispositive conclusion without affording the plaintiff an opportunity to contest the facts assumed in that conclusion. *Scheuer*, 416 U.S. at 249-50, 94 S.Ct. at 1693.

With no evidence in the record to support the proposition, the majority of the *en banc* Court of Appeals concluded that the summary suspension of Petitioners' medical staff privileges was an "emergency" because the alleged

conduct of Petitioner required immediate action to protect the lives of patients in Hinds General Hospital. Such a conclusion was based purely on the Respondents' argument (which was never even addressed to the District Court) that since the Bylaws of Hinds General Hospital authorized summary suspension under such circumstances, those circumstances therefore existed in Petitioner's particular case. On appeal, Petitioner categorically denied that any such "exigent circumstances" existed. The Respondents' argument on appeal, and the conclusion of the *en banc* Court of Appeals, necessarily called for a **factual determination** as to whether "exigent circumstances" actually did exist which would justify a summary suspension without notice and a hearing. Since the record before the District Court contains no testimony whatsoever, the conclusion of the *en banc* Court of Appeals that the Respondents "followed every step of its medical staff bylaws both before and after Dr. Caine's suspension," despite Petitioner's fifty pages of allegations to the contrary, is anathema to the well-established law of Rule 12(b)(6) of the Federal Rules of Civil Procedure and fundamental principles of modern pleading.

In order to give credence to the Respondents' factual attack on Petitioner's Complaint on appeal, the majority of the *en banc* Court of Appeals purported to rely on the assertions made in certain exhibits attached to Petitioner's Complaint rather than the Complaint itself. The majority of the *en banc* Court of Appeals accepted as true the factual assertions made by various of the Respondents in certain of the exhibits, rather than the allegations of the Petitioner's Complaint negating such unsworn assertions. The District Court itself did not even consider those documents, let alone the matters asserted in them as true.

Thus, the *en banc* Court of Appeals, by considering matters outside the Petitioner's Complaint, engaged in a *sua sponte* summary judgment proceeding in direct violation of both Rule 12(b) and Rule 56 of the Federal Rules of Civil Procedure. "[T]he only information necessary for a decision on [a 12(b)(6)] motion is to be found in the pleading itself; if outside evidence is considered, the motion becomes one for summary judgment." 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1363, at 460 (1990) (footnote omitted). Yet the majority of the *en banc* Court of Appeals never gave Petitioner even the slightest indication that such procedure was being employed, and Petitioner was never given the opportunity, **at any stage**, to submit supplemental sworn testimony. Where a Rule 12(b)(6) motion is converted into a motion for summary judgment, all parties must be given the opportunity to present materials pertinent to such motion if it is necessary for the court to go beyond the pleadings. *Id.* The majority of the *en banc* Court of Appeals totally disregarded the procedural posture of this case and considered matters outside the Complaint which were not even considered by the District Court. Such was blatant error.

Finally, after the Respondents filed their Motion to Dismiss in the District Court, the Petitioner moved for leave to amend his Complaint to assert a First Amendment claim. The District Court initially granted Petitioner's request, but later denied the request, despite the fact that the Respondents never filed an Answer to the Complaint. Such was plain error and directly contravened Rule 15(a) of the Federal Rules of Civil Procedure. The majority of the *en banc* Court of Appeals totally ignored the plain language of Rule 15(a), for the Petitioner could have amended his Complaint without the permission of the Dis-

trict Court since the Respondents never filed a responsive pleading.

The first sentence of Rule 15(a) provides in relevant part that "[a] party may amend the party's pleading once **as a matter of course at any time** before a responsive pleading is served." (Emphasis added.) The Respondents only filed a Rule 12(b)(6) motion; they never served a responsive pleading. Under Rule 15(a), the District Court thus had no discretion to deny Petitioner's request to amend his Complaint. "[A] party may amend a pleading once without the permission of the court or the consent of any of the other parties to the action if he does so . . . before a responsive pleading has been served." 6 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1480, 574-75 (1990). The fact that Petitioner moved for leave to amend his Complaint cannot prejudice his absolute right to file an Amended Complaint asserting a First Amendment claim under Rule 15(a). "If a party erroneously moves for leave to amend before the time for amending as of course has expired, . . . the amendment should not be handled as a matter addressed to the court's discretion **but should be allowed as of right.**" 6 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1482, 580. The *en banc* Court of Appeals blatantly ignored the plain language of Rule 15(a) in affirming the District Court's "anticipatory dismissal" of Petitioner's First Amendment claim.[2] Moreover, the *en banc* Court of Appeals patently

[2]Petitioner's First Amendment claim could not be dismissed on the basis of the *Parratt/Hudson* doctrine not only because of this Honorable Court's decision in *Zinermon* v. *Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), see Contention II, *infra*, but also because the *Parratt/Hudson* doctrine applies only to procedural due process claims and not to alleged substantive viola-

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violated the well-established law of Rule 12(b)(6) of the Federal Rules of Civil Procedure and engaged in a *sua sponte* summary judgment procedure in direct contravention of this Honorable Court's holding in *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). In sum, the *en banc* Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1(a).

II. The Lower Court's Decision Directly Conflicts with the Recent Decision of This Honorable Court in *Zinermon* v. *Burch*.

The majority of the *en banc* Court of Appeals held that the broad reading of this Honorable Court's decisions in *Parratt* v. *Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled in part not relevant here*, *Daniels* v. *Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), and *Hudson* v. *Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) requires dismissal of Petitioner's Complaint, and that this Honorable Court's decision in *Zinermon* v. *Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) "simply does not apply" to the case *sub judice*. Such a holding not only ignores the broad precedential import of *Zinermon*, but, if allowed to stand, essentially repeals the protections of 42 U.S.C. § 1983 by judicial fiat.

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tions of the Bill of Rights. See, *Parratt* v. *Taylor*, 451 U.S. 527, 545, 101 S.Ct. 1908, 1917, 68 L.Ed.2d 420 (1981) (Blackmun, J., concurring); *id.*, at 552-553, 101 S.Ct. at 1921-1922 (Powell, J., concurring in result); *see also*, *Hudson* v. *Palmer*, 468 U.S. 517, 541-542, 104 S.Ct. 3194, 3208, 82 L.Ed.2d 393 (1984), n. 4, (Stevens, J., concurring in part and dissenting in part).

As a practical matter, the holding of the majority of the *en banc* Court of Appeals openly grants persons acting "under color of state law" a license to abuse their delegated governmental authority with absolute constitutional immunity. Further, the majority decision of the *en banc* Court of Appeals essentially overrules the decisions of this Honorable Court in *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) and its progeny by requiring a plaintiff, in an action brought pursuant to 42 U.S.C. § 1983, to show that a government entity's statutes or regulations are constitutionally "infirm" on their face in order to state a cause of action for a deprivation of constitutional rights at the hands of persons acting "under color of state law." Such a limited legal definition of "state action" assumes that "the state" acts **only** through its codified statutes and regulations, not its agents, and reduces the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 to utterly hollow protections against overt abuses by government actors.

In *Zinermon* v. *Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), this Honorable Court resolved the conflict among the Courts of Appeals over the proper scope and application of its decisions in *Parratt* v. *Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) and *Hudson* v. *Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). In the case *sub judice*, as in *Zinermon*, the District Court dismissed the suit under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Further, the Petitioner here, like the plaintiff in *Zinermon*, "seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue." *Zinermon*, 494 U.S. at 136, 110 S.Ct. at 989. Finally, the Respondents herein, like the defendants in *Zinermon*, are the

members of the medical staff of a publicly-owned and operated hospital. Thus, contrary to the conclusion of the majority of the *en banc* Court of Appeals, *Zinermon* must control the disposition of the present case.

In *Zinermon*, Darrell Burch was transported to Apalachee Community Mental Health Services in Tallahassee, Florida, after he had been found wandering along a Florida highway appearing hurt and disoriented. Burch was confused and appeared to be hallucinating when he arrived at the facility. After his arrival, members of the facility's staff requested that Burch sign some voluntary admission forms giving consent to admission and treatment. After remaining there for three days, Burch was transferred to Florida State Hospital (FSH), a mental health facility owned and operated by the State of Florida. After arriving at FSH, Burch again signed forms for voluntary admission and treatment. Burch remained at FSH for approximately five months. During that time, a hearing was never held regarding his hospitalization and treatment.

Burch filed suit under 42 U.S.C. § 1983 against various members of the medical staffs of both mental health facilities, alleging that he was deprived of his liberty without due process of law because the officials at the facilities knew or should have known that he was incompetent to consent to voluntary admission and that they therefore were required to implement Florida's statutory involuntary admission procedures which included "notice, a judicial hearing, appointed counsel, access to medical records and personnel, and an independent expert examination." *Zinermon*, 494 U.S. at 123, 110 S.Ct. at 982. The District Court dismissed Burch's claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, relying on the holdings in *Parratt* and *Hudson*. A panel of the Eleventh Circuit

affirmed. A plurality of the Eleventh Circuit, *en banc*, reversing, reasoned that the petitioners "were acting as the State, and since they were in a position to give Burch a hearing, and failed to do so, the State itself was in a position to provide pre-deprivation process, and failed to do so." *Zinermon*, 494 U.S. at 116, 110 S.Ct. at 978.

This Honorable Court agreed with the *en banc* Court of Appeals and affirmed. In *Zinermon*, the State of Florida, like the *en banc* Court of Appeals hereinbelow, contended that since the complained-of conduct was contrary to state law, and state law provided a remedy for the alleged wrong, the conduct fell within the scope of this Honorable Court's holdings in *Parratt* and *Hudson*. On the basis of *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), this Honorable Court observed that "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983." *Zinermon*, 494 U.S. at 124, 110 S.Ct. at 982. This Honorable Court then classified Burch's claim as a procedural due process claim and concluded, on the basis of the holdings in *Mathews* v. *Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) and *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), that pre-deprivation procedures would have been of value under the facts alleged in Burch's complaint, and therefore, should have been provided. *Zinermon*, 494 U.S. 135, 110 S.Ct. at 988. This Honorable Court then addressed the question of whether the conduct complained of was "random and unauthorized" within the meaning of *Parratt* and *Hudson*. This Honorable Court concluded that the complained-of conduct was not "random" within the meaning of *Parratt* and *Hudson* because "[a]ny erroneous deprivation will occur, if at all, at a specific, predictable

point in the admission process-when a patient is given admission forms to sign." *Zinermon*, 494 U.S. at 136, 110 S.Ct. at 989. This Honorable Court then concluded that, unlike *Parratt* and *Hudson*, it was not impossible for the defendants to provide Burch with pre-deprivation process because the state already had "an established procedure for involuntary placement." *Zinermon*, 494 U.S. at 136-37, 110 S.Ct. at 989.

Finally, this Honorable Court concluded that the deprivation of liberty of which Burch complained was not "unauthorized" within the meaning of *Parratt* and *Hudson*. This Honorable Court observed:

> [P]etitioners cannot characterize their conduct as "unauthorized" in the sense the term is used in *Parratt* and *Hudson*. The State delegated to them the power and authority to effect the very deprivation complained of here, Burch's confinement in a mental hospital, and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement. . . . The deprivation here is "unauthorized" only in the sense that it was not an act sanctioned by state law but, instead, was a "depriv[ation] of constitutional rights. . . by an official's abuse of his position." [Citation omitted.]

Zinermon, 494 U.S. at 138, 110 S.Ct. at 990.

When the holding of *Zinermon* is applied to the facts as alleged in Petitioner's Complaint, it is manifest that the Petitioner properly stated a claim for deprivation of his constitutional rights under 42 U.S.C. § 1983, and that the majority of the *en banc* Court of Appeals simply ignored *Zinermon* and relied upon non-facts in order to craft its own result-oriented version of procedural due process jurisprudence. First, the deprivation of Petitioner's property

interest in his medical staff privileges at Hinds General Hospital was not "random" within the meaning of *Parratt* and *Hudson*. As soon as Respondents commenced levelling "charges" against Petitioner that might lead to the suspension and revocation of his medical staff privileges, they had the concomitant duty to provide Petitioner with both **pre-deprivation and post-deprivation** procedures in the Medical Staff Bylaws which comported with due process. Because the alleged "charges" levelled against Petitioner could result in the suspension and destruction of his professional career, the deprivation of those medical staff privileges was certainly foreseeable and predictable. To use the terminology of *Zinermon*, the erroneous deprivation of Petitioner's medical staff privileges would occur, "if at all, at a specific, predictable point" in the peer review process. As in *Zinermon*, it was not impossible for the Respondents to provide Petitioner with the process which was his due because Hinds General Hospital already had procedures for suspension and revocation of medical staff privileges in its Medical Staff Bylaws. The Respondents simply chose to ignore those procedures. Second, the suspension and revocation of Respondent's medical staff privileges was certainly not "unauthorized" within the meaning of *Parratt* and *Hudson*.[3] *Miss. Code Ann.* § 74-25-93(1) (1989 Supp.) provides:

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[3]The Petitioner also maintains that his due process claim does not fall within the scope of the *Parratt Hudson* doctrine because Mississippi law provides only a thirty (30)-day statute of limitations for challenging public hospital peer review decisions in Mississippi Chancery Court, and such law bars the recovery of any damages, the restoration of medical staff privileges or the awarding of any attorney fees. *Miss. Code Ann.* §73-25-92; *Wong v. Garden Park Comm. Hosp.*, 565 So.2d 550 (Miss., 1990). Further,

(*Continued on next page.*)

> Any hospital licensed pursuant to sections 41-9-1 et seq. is authorized to suspend, deny, revoke or limit the hospital privileges of any physician practicing or applying to practice therein, if the governing board of such hospital, after consultation with the medical staff considers such physician to be unqualified because of any of the acts set forth in section 73-25-83; provided, however, that the procedures for such actions shall comply with the hospital and/or medical staff bylaw requirements for due process.

The above statute makes it clear that the State of Mississippi delegated to the Respondents herein the power to deprive Petitioner of his medical staff privileges. The Respondents were therefore acting as the State and had the duty to provide Petitioner with fair procedures comporting with due process. As in *Zinermon*, Petitioner has alleged that the Respondents failed to provide him with fair procedures and that such failure was the result of "an official's abuse of his position." *Zinermon*, 494 U.S. at 138, 110 S.Ct. at 990. This Honorable Court recently held, in a unanimous decision, that Congress enacted § 1983 "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority **or misuse it.**" *Hafer* v. *Melo*, ___ U.S. ___, 112 S.Ct. 358, 363, ___ L.Ed.2d ___ (1991),

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to force the Plaintiff to file his §1983 claim in the Mississippi Chancery Court would necessitate him doing so within the thirty (30)-day limitation, thereby unconstitutionally truncating the statute of limitations for civil rights actions which, otherwise in Mississippi, is one year. *Felder* v. *Casey*, ___ U.S. ___, 108 S.Ct. 2302, ___ L.Ed.2d ___ (1988). Thus, Mississippi law fails to provide an "adequate post-deprivation remedy" within the meaning of *Parratt Hudson*.

quoting, Scheuer v. *Rhodes, supra,* and *Monroe* v. *Pape, supra.* (Emphasis added.) The decision of the *en banc* Court of Appeals flies directly in the face of the holdings in *Monroe, Zinermon* and *Hafer* and the well established constitutional principles upon which those decisions stand, leaving citizens at the mercy of government officials who abuse their positions of authority. Such is at odds not only with the recent pronouncements of this Honorable Court in *Zinermon,* but with the remedial purposes of Congress in enacting 42 U.S.C. § 1983. The *en banc* Court of Appeals has openly refused to follow the holding in *Zinermon* and therefore "has decided a federal question in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10.1(c).

CONCLUSION

For the reasons set forth hereinabove, a Writ of Certiorari should issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

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FIFTH CIRCUIT

UNITED STATES COURT OF APPEALS

No. 89-4470

CURTIS W. CAINE, JR., M.D. - - *Plaintiff-Appellant,*

v.

M. D. HARDY, M.D., et al., - - *Defendants-Appellees.*

September 26, 1991.

Anesthesiologist who lost his staff privileges at public hospital brought suit against hospital and certain other physicians claiming deprivation of his right to due process and freedom of speech. The United States District Court for the Southern District of Mississippi, 715 F.Supp. 166, William Henry Barbour, Jr., Chief Judge, dismissed for failure to state claim, and anthesiologist appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) anesthesiologist received sufficient presuspension due process, by requirement that investigation be conducted prior to suspension, even though investigation was conducted only by other anesthesiologists, and (2) suspension did not violate anesthesiologist's First Amendment rights, even though he claimed suspension was based on his opposition to a proposed exclusivity contract for furnishing of anesthesiology services and his unsuccessful campaign for chief of department.

Affirmed.

Jerre S. Williams, Circuit Judge, dissented and filed opinion, with which Brown, Circuit Judge, joined.

Opinion, 905 F.2d 858, superseded.

1. Federal Courts Key No. 401

Survival of actions brought under § 1983 is to be determined by law of forum state. 42 U.S.C.A. § 1983.

2. Abatement and Revival Key No. 54

Actions for defamation are not "personal actions" for purposes of Mississippi survival statute. Miss. Code 1972, § 91-7-237.

See publication Words and Phrases for other judicial constructions and definitions.

3. Abatement and Revival Key No. 60

Suit by anesthesiologist against hospital which had suspended him was not rendered moot by his death; those parts of his claim which alleged wrongful discharge were preserved under Mississippi survival statute. 42 U.S.C.A. § 1983; Miss.Code 1972, § 91-7-237.

4. Constitutional Law Key No. 275(1.5)
Hospitals Key No. 6

Public hospital did not deny due process rights of anesthesiologist by suspending him based upon investigation of committee consisting only of other anesthesiologists, without granting him any further presuspension procedures; further procedures were not required, due to public safety concerns underlying suspension, and availability of comprehensive postsuspension hearing opportunities, including chance for hearing before committee of various medical specialties within seven days of suspension. U.S.C.A. Const. Amend. 14; 42 U.S.C.A. § 1983.

5. Constitutional Law Key No. 90.1(7.2)

First and Fourteenth Amendments protect public employee from discharge in retaliation for speaking out, provided that speech claimed to be protected deals with mat-

ters of truly public concern as opposed to matters of purely personal interest or intraoffice disputes. U.S.C.A. Const. Amends. 1, 14.

6. Civil Rights Key No. 235(3)

Anesthesiologist suspended from public hospital did not state claim under First Amendment by alleging that his suspension resulted from his opposition to proposal under which hospital would enter into exclusive anesthesiology contract with three other physicians, and his unsuccessful campaign to be designated as hospital chief of anesthesiology; speech rights alleged to be violated were those relating to personal matters and intraoffice disputes, rather than matters of public concern, as required for First Amendment to apply. U.S.C.A. Const.Amends. 1, 14.

Appeal from the United States District Court for the Southern District of Mississippi.

Before CLARK, Chief Judge, BROWN, POLITZ, KING, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER, and BARKSDALE, Circuit Judges.[1]

EDITH H. JONES, Circuit Judge:

An anesthesiologist's clinical privileges at a public hospital were suspended with conditions after an investigation and conferences concerning the death of one of his patients, but before a formal hearing was held. This court must now decide *en banc* whether the doctor's discipline followed the

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[1]Judge Emilio M. Garza became a member of the Court after this case was heard *en banc* but elected not to participate in the decision; Judge Sam D. Johnson took senior status after the case was heard but before this opinion was rendered and did not participate in the decision of this case. *See United States* v. *Anderson*, 885 F.2d 1248, 1249 (5th Cir. 1978) (*en banc*).

dictates of procedural due process. To a reasonable layman, there would be no dilemma: after a patient died while under the anesthesiologist's care, suspension pending a hearing would seem an obvious answer. Constitutional law does not, however, always deal in the obvious. We reach the same conclusion as the intuitive one, but after following paths well rutted by decisions of the Supreme Court.

I. BACKGROUND

Dr. Curtis W. Caine, Jr. filed suit in the United States District Court for the Southern District of Mississippi against nearly two dozen defendants, including the administrator and all the members of the Executive Committee and the Board of Trustees of Hinds County General Hospital, alleging the denial of procedural due process occasioned by the swift suspension of his clinical privileges. To his fifty-page complaint Dr. Caine attached 250 pages of exhibits described as "true and correct copies" of the relevant documents. The hospital staff bylaws and virtually every letter or report pertinent to Dr. Caine's suspension proceedings, whether prepared on his behalf or by hospital personnel, were appended in neat chronological order. They tell a tale that mirrors most of the facts, if not the legal characterizations, espoused in the complaint.

On April 7, 1988, defendant Dr. M.D. Hardy, the Chief of Anesthesiology of Hinds General, asked Dr. Caine to discuss a certain patient who had been under Dr. Caine's care two months earlier. Dr. Caine then met twice, for a total of three hours, with Drs. Hardy, Strong, and Courtney, all anesthesiologists and members of the Ad Hoc Investigating Committee previously appointed to review the treatment of the patient in question. When his lawyer advised him that the first meeting was inadequate, Dr. Caine requested and obtained the second meeting. Less than a week after the second meeting with Dr. Caine, the Ad Hoc Investigat-

ing Committee reported to the hospital's Executive Committee that Dr. Caine's handling of the case exhibited serious deficiencies. Although each member of the Ad Hoc Committee recommended a different sanction, the most clement of these called for immediate and continued suspension of Dr. Caine's clinical privileges pending his completion of a six-month course of additional anesthesiology training.

Three days later, on April 25, the Executive Committee —composed of two members of the Ad Hoc Committee and nine other non-anesthesiology staff doctors—discussed the Ad Hoc Committee's written reports. The minutes of the Executive Committee meeting list five alleged critical errors in Dr. Caine's management of the patient. Unanimously, the Committee suspended Dr. Caine's clinical privileges immediately, but offered him the opportunity to reapply for them when he completed a twelve-month anesthesiology residency and agreed to submit to a three-month probationary status at Hinds General.

The Executive Committee specified in its written notice that it took this action pursuant to Article VI, Section 2(a) of the medical staff bylaws.[2] It advised Dr. Caine of his right, under Article VII of the bylaws, to request a formal hearing. On May 4, Dr. Caine so requested. He did not, however, accept the hospital's offer to convene the hearing within seven days, but instead requested and received two continuances. Eventually, after a hearing had been set for sometime in July, he categorically declined to participate in the hospital's post-suspension procedures. The bylaws would have afforded not only a formal hearing before an ad hoc hearing committee, but also an appeal to the Board of Trustees. Dr. Caine also chose not to take advantage of his right to judicial review of the hospital's decision in the

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[2]Hinds County General Hospital, *Medical Staff Bylaws, Rules and Regulations* (1987).

Mississippi chancery court. *See* Miss.Code Ann. § 73-25-95 (incorporating *id.* § 73-25-27).

In form, the hospital followed every step of its medical staff bylaws both before and after Dr. Caine's suspension.[3]

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[3]The bylaws provide in relevant part:

ARTICLE VI.
CORRECTIVE ACTION

Section 1: Procedure.

a. Whenever . . . any member of the Medical Staff . . . has cause to question, with respect to an individual holding a current Medical Staff appointment:

. . . . . .

(2) His care or treatment of a patient or patients or his management of a case;

. . . . . .

a written request for an investigation shall be adressed to the Executive Committee making specific reference to the activity or conduct which gives rise to the request. . . .

b. The Executive Committee shall forward any requests for corrective action to the Section Chief of the Clinical Section in which the questioned activity or conduct occurred, and to the Chief of Staff. The Chief of Staff shall immediately appoint a three member ad hoc committee consisting of members of the Clinical Section or department affected to investigate the matter. Within twenty (20) days after the receipt of the request for corrective action, the committee shall forward its written report of the investigation to the Executive Committee. Prior to the making of any such report that would recommend probation, reduction, suspension or revocation of clinical privileges, . . . the practitioner against whom corrective action has been requested shall have an opportunity for an interview with the ad hoc investigative committee. At such interview, the affected practitioner shall be informed of the general nature of the charges against him, and shall be invited to discuss, explain or refute them. . . .

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c. Within ten (10) days following the receipt of the report of the ad hoc committee, the Executive Committee shall take action upon the request. Such action may include, without limitation:

. . . . .

(4) Recommending reduction, suspension or revocation of clinical privileges;

. . . . .

d. Any action by the Executive Committee as described [above] shall entitle the practitioner to the procedural rights as provided in Article VII.

. . . . .

Section 2: Summary Suspension

a. Whenever a practitioner willfully disregards these By-laws or other Hospital policies, or whenever his conduct requires that immediate action be taken to protect the life of any patient(s) or to reduce the substantial likelihood of immediate injury or damage to the health or safety of any patient, . . . the Executive Committee of the Medical Staff shall have the authority to summarily suspend . . . the clinical privileges of such practitioner. . . .

c. Unless the Executive Committee [no later than five (5) days from the date of such summary suspension] recommends immediate termination of the suspension and cessation of all further corrective action, the practitioner shall be entitled to the procedural rights provided in Article VII of the By-laws. . . .

ARTICLE VII.
HEARING AND APPELLATE REVIEW PROCEDURE

Section 1. Right to Hearing and to Appellate Review.

a. Whenever any individual receives notice of a recommendation of the Executive Committee that, if ratified by decision of the Board of Trustees, will adversely affect . . . his/her exercise of clinical privileges, he/she shall be entitled to a hearing before an ad hoc committee of the Medical Staff. If the recommendation

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of the Executive Committee following such hearing is still adverse to the affected individual, he/she shall be entitled to an appellate review by the Board of Trustees before it makes a final decision on the matter.

Section 4. Composition of Hearing Committee.

a. When a hearing relates to an adverse recommendation of the Executive Committee, such hearing shall be conducted by an ad hoc hearing committee consisting of five (5) members of the Medical Staff appointed by the Chief of Staff in consultation with the Executive Committee. . . . No staff member who has actively participated in the consideration of the adverse recommendation shall be appointed as a member to this hearing committee. . . . Further, no staff member who is in direct economic competition with the Medical Staff member involved shall be appointed as a member to this hearing committee.

Section 5. Conduct of Hearing.

e. The affected individual shall be entitled to be accompanied by and/or represented at the hearing by a member of the Medical Staff in good standing, or by a member of his local professional society. . . .

h. Each party shall have the following rights: To call and examine witnesses, to introduce written evidence, to cross-examine any witness or any matter relevant to the issue of the hearing, to challenge any witness and to rebut any evidence. . . .

. . . . .

j. Within twenty (20) days after final adjournment of the hearing, the hearing committee shall make a written report and recommendation and shall foward the same together with the hearing record and all other documentation to the Executive Committee. . . . The report may recommend confirmation, modification or rejection of the original adverse recommendation of the Executive Committee. . . .

k. Within twenty (20) days after the receipt of the report of the hearing committee, the Executive Committee . . . shall consider the same and render its decision. . . .

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Specifically, Dr. Caine was suspended by the Executive Committee for conduct that "requires that immediate action be taken to protect the life of any patient(s) or to reduce the substantial likelihood of immediate injury or damages to the health or safety of any patient." Article VI, Section 2(a).

Dr. Caine does not deny that the Executive Committee invoked and relied on Article VI, Section 2(a) in his case. His complaint, however, shines a different light on the formalities observed. Dr. Caine alleges that his troubles were unleashed by his then-recent opposition to Dr. Hardy's proposal to obtain for himself and his two partners an exclusive anesthesiology contract with the hospital, a contract that would have frozen out all other anesthesiologists. To punish Dr. Caine's stance—and his unsuccessful candidacy against Dr. Hardy for Chief of the Anesthesiology Department—Drs. Hardy, Courtney, and Strong allegedly failed to give Dr. Caine proper notice of the charges against him prior to his April 11 and 16 meetings and refused him sufficient access to the relevant patient chart. Finally, Dr. Caine alleges that all the decisionmakers in his case were biased by their self-interest or by the gossip campaign mounted by Dr. Caine's detractors. He contends that nothing less than a formal pre-suspension hearing, before doctors not associated with Hinds General, was constitutionally required. To supplement his procedural due process claim, Dr. Caine proposed to amend his complaint to assert that he was disciplined in violation of his first amendment right to speak out on the exclusive anesthesiology contract as a matter of "public concern."

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Section 6. Appeal the the Board of Trustees.

a. Within ten (10) days after receipt of a notice by an affected individual of an adverse recommendation or decision made or adhered to after a hearing as provided, he/she may . . . request an appellate review by the Board of Trustees.

The district court granted the defendant's motion to dismiss the complaint under Fed.R.Civ.P. 12(b)(6). On the procedural due process issue, the court found that even if Dr. Caine's allegations against the defendants were true, they failed to allege that Mississippi law afforded an inadequate post-deprivation remedy for the suspension of his privileges at Hinds General. The court rejected Dr. Caine's proposed first amendment claim because, again assuming the truth of the doctor's allegations, the court disagreed that the doctor had engaged in constitutionally protected speech. On initial appeal, a panel of our court held that under the Supreme Court's most recent procedural due process decision, *Zinermon* v. *Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), Dr. Caine's allegations, if true, would support a judgment that his due process rights were violated. The divided panel also held that the district court must consider the first amendment claim on remand.

Having reconsidered this case *en banc*, our court now holds that Dr. Caine's complaint does not allege a procedural due process violation and that the district court did not err in refusing his proffered first amendment claim. We therefore affirm the district court's judgment.

II. MOOTNESS

Before addressing the merits, we must dispose of an unfortunate preliminary issue. After this case was reargued *en banc*, Dr. Caine died of a heart attack. Dr. Caine's counsel moved to revive the action in the name of Dr. Caine's personal representative. To the contrary, the defendants argue that Dr. Caine's death abates the lawsuit and moots this appeal. After researching the issue, we agree with the plaintiff and conclude that the case as a whole is not moot.

[1] Obviously, Dr. Caine's quest for reinstatement of his medical privileges does not survive his death. Whether his prayer for money damages survives, on the other hand,

is not such an easy question. The Supreme Court has held that the survival of actions brought pursuant to 42 U.S.C. § 1983 is to be determined by the law of the forum state. *Robertson* v. *Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L. Ed.2d 554 (1978). The relevant Mississippi statute provides: "When either of the parties to any personal action shall die before final judgment, the executor or administrator of such deceased party may prosecute or defend such action, and the court shall render judgment for or against the executor or administrator." Miss.Code Ann. § 91-7-237. Whether Dr. Caine's lawsuit survives depends on whether it is a "personal action."

The Mississippi courts have long defined a personal action as "an action brought for the recovery of personal property, for the enforcement of a contract or to recover damages for its breach, or for the recovery of damages for the commission of an injury to the person or property." *Powell* v. *Buchanan*, 245 Miss. 4, 8, 147 So.2d 110, 111 (1962). One way to apply this definition to § 1983 actions is to examine the facts of each separate § 1983 claim and characterize it according to the most analogous state-law cause of action. In his procedural due process claim, Dr. Caine alleged that the defendants performed their actions "wantonly, willfully and maliciously, and with the intent to remove Plaintiff from the Medical Staff of Hinds General Hospital and to undermine and destroy his practice of anesthesiology and medicine." These allegations seem analogous to claims for wrongful discharge and defamation. Dr. Caine's proposed first amendment claim, alleging that he was fired for exercising his right to free speech, is also best characterized as a wrongful discharge claim.

[2, 3] Actions for defamation are not personal actions for purposes of the survival statute. *See Catchings* v. *Hartman*, 178 Miss. 672, 680, 174 So. 553, 554 (1937) ("[T]he action of slander is not a personal action within the strict

interpretation which the statute must now receive."); *cf. Mitchell* v. *Random House, Inc.*, 703 F.Supp. 1250, 1255 n. 5 (S.D.Miss. 1988)(relying on *Catchings*), *aff'd*, 865 F.2d 664 (5th Cir. 1989). On the other hand, we conclude that wrongful discharge, were it recognized as a viable action in Mississippi, would be a personal action.[4] *Perry* v. *Sears, Roebuck & Co.*, 508 So.2d 1086, 1089 (Miss.1987), noted that "[w]rongful discharge actions . . . essentially sound in tort, although some theories have attributes associated with both contract and tort." Described this way, wrongful discharge would seem to be an action "to recover damages for [a contract's] breach, or for . . . an injury to the person" within the scope of § 91-7-237. Under this analysis, then, that part of Dr. Caine's § 1983 action for damages resulting from the act of wrongful suspension itself survives Dr. Caine's death.

Another way to apply the definition of personal action is to make a single federal characterization of all § 1983 actions for survival purposes. *See Wilson* v. *Garcia*, 471 U.S. 261, 276, 105 S.Ct. 1938, 1947, 85 L.Ed.2d 254 (1985) (for limitations purposes, all § 1983 claims should be characterized as "tort action[s] for the recovery of damages for personal injuries"). If we transplant *Wilson's* holding to the survival context, it is easy to conclude that all § 1983 actions are actions "for the recovery of damages for the

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[4]As recently as 1987, the Mississippi Supreme Court found no occasion to overrule the common-law doctrine of employment-at-will and create a tort action for wrongful discharge. *See Perry* v. *Sears, Roebuck & Co.*, 508 So.2d 1086, 1089-90 (Miss. 1987) (declining to reconsider *Kelly* v. *Mississippi Valley Gas Co.*, 397 So.2d 874 (Miss. 1981)). We note, however, that a federal district court in a diversity case held that the state supreme court "would recognize a limited public policy exception to the employment-at-will rule." *Laws* v. *Aetna Finance Co.*, 667 F.Supp. 342, 348 (N.D. Miss. 1987).

commission of an injury to the person" within the scope of § 91-7-237. Thus, Dr. Caine's lawsuit would also survive under this analysis. Because "[a] determination by this Court of the legal issues tendered by the parties" will certainly "affect the rights of litigants in the case before [us]," this case is not moot. *DeFunis* v. *Odegaard*, 416 U.S. 312, 316, 317, 94 S.Ct. 1704, 1705, 1706, 40 L.Ed.2d 164 (1974)(per curiam). Accordingly, we turn to the merits.

III. PROCEDURAL DUE PROCESS

[4] The Constitution guarantees that life, liberty, or property will not be taken by the government without due process of law. U.S. Const. amend. XIV, § 1. Procedural due process considers not the justice of a deprivation, but only the means by which the deprivation was effected. Because Dr. Caine could not be dismissed without just cause, his tenure on the Hinds General medical staff was a property interest recognized by the Constitution. *Darlak* v. *Bobear*, 814 F.2d 1055, 1061 (5th Cir. 1987)(citing cases). Thus, the parties' dispute centers on whether the procedure employed in Dr. Caine's suspension was constitutionally adequate. We are convinced that it was.

Integral to our analysis is the concession that Dr. Caine was sanctioned under the bylaw authorizing quick action by the hospital to protect the lives of patients.[5] While Dr.

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[5]Although we must assume the truth of Dr. Caine's allegations for purposes of reviewing the court's Rule 12(b)(6) dismissal, those allegations must be read in tandem with the vouchsafed exhibits attached to Dr. Caine's complaint. *see Zinermon*, 110 S.Ct. at 979.

The dissent asserts that as a result of our analysis, Rule 12(b)(6) is a dead letter because we have effectively drawn factual inferences against Dr. Caine, rather than assuming the truth of his allegations. C. Wright, Federal Courts, 3d Ed. § 68. This hyper-

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Caine's brief and pleadings do not deny the resort to Article VI, Section 2(a), neither do they squarely confront its ramifications. Their vigorous argument for more pre-suspension process may mean either that informal procedures are never constitutional in this type of case or that the informal procedures used here were fatally tainted by bias, lack of notice, and departure from the hospital's regulations. In either case, we must disagree.

Procedural due process is a flexible concept whose contours are shaped by the nature of the individual's and the state interests in a particular deprivation. Ordinarily, government may effect a deprivation only *after* it has accorded due process, but the necessary amount and kind of predeprivation process depends upon an analysis of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safegruards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

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bole is incorrect. Dr. Caine's complaint nowhere took issue with the original ground for the investigation against him, the death of one of his patients. This fact is clearly stated in the documents attached to his petition. It is our position that this fact invokes the "public safety" rationale for truncated predeprivation process followed by an adequate post-suspension remedy. *Zinermon*, 110 S.Ct. at 984. We continue to assume that bias infected the outcome of the investigation but, given the exigent circumstances, that defect does not change the due process analysis. To hold otherwise would eviscerate the public safety component of due process analysis.

Mathews v. *Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). Though the state must, for instance, accord a public employee "some kind of hearing" before termination, this may consist of no more than a meeting at which the employer states the grounds for dismissal and gives the employee an opportunity for rebuttal. *See Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 546, 105 S.Ct. 1487, 1495, 84 L.Ed.2d 494 (1985). The brief pre-termination hearing is satisfactory so long as it is coupled with more formal post-termination proceedings, for this allocation of the burden of a hearing protects both the employee and the employer's interest in maintaining an efficient workplace.

Not even an informal hearing, however, must precede a deprivation undertaken to protect the public safety. Starting with a case that authorized summary confiscation of potentially contaminated food products, *North Am. Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908), the Supreme Court has consistently held that "the necessity of quick action by the State" justifies a summary deprivation followed by an adequate post-deprivation remedy. *Parratt* v. *Taylor*, 451 U.S. 527, 539, 101 S.Ct. 1908, 1915, 68 L.Ed.2d 420 (1981), *overruled in part not relevant here*, *Daniels* v. *Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *See also Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 436, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265 (1982); *Zinermon*, 110 S.Ct. at 984.

In a case strikingly similar to this one, our court applied these principles and concluded that a doctor's temporary suspension from a hospital staff, followed by an opportunity for a more formal hearing later, comported with due process. *Darlak v. Bobear*, 814 F.2d at 1062-63. As in *Darlak*, Dr. Caine had the opportunity to defend himself twice before the Ad Hoc Investigating Committee prior to his temporary suspension. As in *Darlak*, Dr. Caine could have

invoked, but did not, the right provided by Article VII of the hospital bylaws to a formal post-suspension hearing within seven days of the Executive Committee's summary action. Thus, because Dr. Caine was summarily suspended under exigent circumstances, it is plain that the *Mathews* balancing test forecloses any procedural due process claim. *See Darlak.* Due process does not require an extensive formal hearing prior to a summary suspension of medical privileges, so long as an adequate post-termination remedy exists.

In pursuit of his claim, Dr. Caine cites not *Darlak*, but *Zinermon* v. *Burch*, asserting that this recent Supreme Court decision demonstrates constitutional flaws in his suspension. *Zinermon* took aim at a split in the courts of appeals over the application of the *Parratt/Hudson* doctrine, which provided that a "random, unauthorized" deprivation would not violate procedural due process if the state furnished an adequate post-deprivation remedy. *See Zinermon*, 110 S.Ct. at 977-78 (citing *Parratt*, *supra*, and *Hudson* v. *Palmer*, 468 U.S. 517, 104 S.Ct. 3149, 82 L.Ed.2d 393 (1984)). The genesis of *Parratt/Hudson* lay in the insight that "the State cannot be required constitutionally to do the impossible by providing predeprivation process" to stem aberrant, unpredictable conduct. *Id.* 110 S.Ct. at 985.

Dr. Caine poses the question whether *Zinermon* requires us to look again at the sufficiency of pre- and post-suspension procedures made available to him if, as he alleges, the decisionmakers deliberately misused those procedures. Put otherwise, Dr. Caine contends that after *Zinermon*, the *Parratt/Hudson* doctrine cannot salvage the denial of due process inherent in biased decisionmaking.

The easy answer to these questions is that *Zinermon* simply does not apply. We have found that Dr. Caine stated no claim for denial of procedural due process. His assertion that he was the victim of partisan decisionmaking

is of no moment. He is stating no more than that the risk of erroneous decision presented by the participation of his competitiors in the decision to suspend his privileges was unacceptable. The *Mathews* v. *Eldridge* balance has, however, answered that assertion—concluding that this is a tolerable risk when compared with the state's powerful interest in protecting patient safety. The State of Mississippi has provided Dr. Caine all the process that is due. The state has no constitutional duty to provide a procedural regimen that guarantees faultless decisionmaking; the state's interests in safety and efficiency find expression in the tolerable level of risk. When that balance has been fairly struck, a person states no claim by asserting that such risk was visited upon him.

We do not read *Zinermon* as fundamentally altering the balancing of personal and state interests that Mathews prescribed as the test for procedural due process. Rather, the *Zinermon* majority opinion characterizes its analysis as an application of the *Parratt/Hudson* doctrine which in turn implemented Mathews balancing. 110 S.Ct. 985ff. We emphasize that Dr. Caine received all the process he was due, taking into account the state's powerful interests as well as his private interests. But even if it be assumed *arguendo* that the bias and lack of notice of charges against him were not adequately redressed by the hospital's pre-deprivation procedures, we would nevertheless find Dr. Caine's claim foreclosed by the *Parratt/Hudson* doctrine as refined by *Zinermon*.

Zinermon holds that if "random and unauthorized" conduct of state actors is alleged, the mere existence of even an "adequate" post-deprivation remedy does not satisfy procedural due process where (a) the particular pre-deprivation administrative procedure presents a high risk of erroneous deprivation, and (b) there is a substantial likelihood that further minimal procedural safeguards could prevent

the erroneous deprivation. *Zinermon* thus requires a hard look at a *Parratt/Hudson* defense to determine whether the state officials' conduct, under all the circumstances, could have been adequately foreseen and addressed by procedural safeguards. *Zinermon* did not explicitly or implicitly disavow the *Parratt/Hudson* doctrine; instead, it requires case-by-case analysis of the deprivation at issue. *See* 110 S.Ct. at 987-90.

Zinermon stated three preconditions for application of the *Parratt/Hudson* doctrine: the deprivation must truly have been unpredictable or unforeseeable; the pre-deprivation procedures must have been impotent to counter the state actors' particular conduct; and the conduct must have been "unauthorized" in the sense that it was not within the officials' express or implied authority. *Id.* at 987-88. Each of these criteria is established in the case before us.

First, while the deprivation of a doctor's clinical privileges for alleged medical malpractice is foreseeable, the risk of deprivation as alleged here by Dr. Caine was not. His pleadings do not suggest that the hospital's precise and detailed regulations are infirm. Rather, he alleges that the regulations were *violated*, purportedly at every stage, by the dozen or so state actors responsible for enforcing them. The contrast with *Zinermon* is clear, for there the Florida voluntary commitment procedure operated against people who already lacked their full faculties. In that case, the plaintiff was afforded *no* predeprivation process. He was mentally ill and had "voluntarily" admitted himself to a Florida hospital although he was visibly incompetent to do so. *Zinermon* characterizes the risk facing the patient as one of an erroneous deprivation made possible by Florida's voluntary commitment procedures. Any risk to Dr. Caine, however, would have sprung only from wanton and intentional violations of controlling state regulations.

Second, it is inconceivable that the state could have articulated more explicit procedural safeguards to protect Dr. Caine against the specific risk that his privileges would be suspended because of his peers' anti-competitive motives. *See id.* 987-88. The hospital regulations state when, how, and for what reasons doctors may be disciplined. They permit immediate suspension only to protect the safety of patients—and then only after an investigation. Further, it is the multimember Executive Committee, not simply the affected doctor's "competitors" in his specialty field, who must take this action. In *Zinermon,* as previously observed, there was no pre-deprivation pocess to protect the incompetent mental patient from imprudently committing himself.

Third, it cannot be said that the decision-makers in this case were "authorized" either to misuse the regulations or to discipline Dr. Caine for improper purposes. Our court has consistently held that mere conclusory allegations of bias do not render infirm otherwise constitutionally adequate procedures. *Holloway* v. *Walker,* 784 F.2d 1287, 1292-93 (5th Cir. 1986); *Laje v. R.E. Thomason Gen. Hosp.,* 564 F.2d 1159, 1162 (5th Cir. 1977); *Megill* v. *Board of Regents of Fla.,* 541 F.2d 1073, 1079 (5th Cir. 1976); *Duke* v. *North Tex. State Univ.,* 469 F.2d 829, 834 (5th Cir. 1972). *Zinermon* provides no basis to disavow this rule. Although the hospital's bylaws provide that the initial investigation of a staff doctor will be undertaken by members of his clinical section, any final disciplinary decision is entrusted to the large, diverse Executive Committee. The regulations governing formal hearings, not invoked here by Dr. Caine, specifically prevent bias based on economic competition or prior investigatory responsibilities. *See* Bylaws Art. VII § 4(a), fn. 2 *supra.* The potential for biased decisionmaking was minimized significantly. In *Zinermon,* by contrast, the voluntary admission of the patient may have been an

abuse of judgment by the mental hospital staff, but the exercise of that judgment was specifically condoned by the regulations: "Florida's [statutory scheme] . . . gives state officials *broad power and little guidance* in admitting mental patients." 110 S.Ct. at 988 (emphasis added). Such is emphatically not the case here. The Ad Hoc Committee had to persuade the Executive Committee that Dr. Caine's conduct threatened patient safety, a stiff and exacting burden.

The facts that distinguish *Zinermon* from *Parratt/Hudson* do not appear in this case. Even under Dr. Caine's conclusory allegations, the deprivation he suffered was "random and unauthorized." Moreover, there were adequate and prompt post-deprivation remedies available to Dr. Caine. Whether or not suspension is immediate, the hospital bylaws provide opportunity for a formal investigation and evidentiary hearing, possible appeal to the hospital board of trustees, and a final resort to the state courts for prompt judicial review.[6] Therefore, according

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[6]For purposes of *Parratt/Hudson*, this judicial review *is an* "adequate post-deprivation remedy" for random and unauthorized violation of the hospital regulations. Under the statutory review provisions, the aggrieved physician may appeal to the chancery court within 30 days of receiving notice of the final decision to suspend or revoke his medical privileges. *See* Miss. Code Ann. § 73-25-92 (incorporating *id.* § 73-25-27). The statute requires the court to consider whether "the procedures followed by [the hospital] violated its own bylaws for due process." *Wong* v. *Garden Park Community Hosp.*, 565 So.2d 550, 553 (Miss. 1990). If the procedures did violate the bylaws, the chancery court's general equity powers would be available for appropriate redress. *See* Miss.Code Ann. § 73-25-27 (the appeal "shall be conducted as other matters coming before the [chancery] court"); *id.* § 9-1-19 (chancery courts may "grant injunctions all other remedial writs,

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to *Parratt/Hudson,* Dr. Caine was not deprived of property without due process of law.

One final observation supports our position. As the dissenters in *Zinermon* predicted, *see* 110 S.Ct. at 995, 996 (O'Connor, J. dissenting), and as Judge Easterbrook has observed, *see Easter House* v. *Felder,* 910 F.2d 1387, 1409 (7th Cir. 1990) (Easterbrook, J., concurring), the courts of appeals have not found *Zinermon* easy to interpret. Nevertheless, in our research, none of the courts as yet called upon to apply *Zinermon* has found a procedural due process violation in claims of particular regulatory abuses carried out within the framework of controlling regulations. *See, e.g., Easter House,* 910 F.2d at 1396-1406 (en banc); *New Burnham Prairie Homes, Inc.* v. *Village of Burham,* 910 F.2d 1474, 1480 (7th Cir. 1990); *Katz* v. *Klehammer,* 902 F.2d 204 (2d Cir. 1990); *Amsden* v. *Moran,* 904 F.2d 748, 754-57 (1st Cir. 1990); *Fields* v. *Durham,* 909 F.2d 94 (4th Cir. 1990); *Plumer* v. *Maryland,* 915 F.2d 927 (4th Cir.

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in all cases where the same may properly be granted according to right and justice").

Furthermore, the aggrieved physician may pursue an action for damages against any person, including the hospital itself, who is responsible for the violations of the bylaws. The statute grants immunity only for "any action taken *without malice* in carrying out the provisions of [the medical staff bylaw requirements]." *Id.* § 73-25-93(2) (emphasis added). As the Mississippi Supreme Court noted in *Wong* v. *Garden Park Community Hospital,* "[t]he statutory scheme does not foreclose an independent legal action to determine the propriety of the termination on the facts." 565 So.2d at 553 (quoting *Wong* v. *Stripling,* 881 F.2d 200, 202 (5th Cir. 1989)). For example, individual physicians who intentionally violated hospital bylaws in order to drive a competitor out of business might be liable for tortious interference with business relations. *See Galloway* v. *Travelers Ins. Co.,* 515 So.2d 678, 682-83 (Miss. 1987).

1990); *Coriz* v. *Martinez*, 915 F.2d 1496, 1470 (10th Cir. 1990). Thus, as *Zinermon* counseled case-by-case application of its principles, so it seems at this stage to represent a sui generis situation.

IV. FIRST AMENDMENT

Dr. Caine also contests the district court's refusal to permit him to amend his complaint and challenge his suspension on first amendment grounds. In the proposed amendment, he alleged that the suspension action was motivated by a desire to silence his opposition to Dr. Hardy's proposal for an exclusive anesthesiology contract and to punish his unsuccessful candidacy for Chief of Anesthesiology. The district court opted to deny the amendment, finding Dr. Caine's allegations failed to state a claim for relief. *See* Fed.R.Civ.P. 12(b)(6). We review *de novo* the legal question whether these allegations state a claim that Dr. Caine's termination violated the first amendment. If they do, then the district court would have erred by refusing to permit the amendment.

[5] Public employees do not, by virtue of their positions, shed their first amendment rights to speak out on matters of public concern. *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). If a public employee's protected speech was the reason for termination, the first and fourteenth amendments afford a claim against the employer. *Mt. Healthy City School Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 283-84, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977). The threshold legal question in such cases is whether the employee's speech dealt with matters of truly public concern as opposed to matters of purely personal interest or intra-office disputes. *Connick* v. *Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983).

[6] Taking Dr. Caine's allegations at face value, as we must in reviewing a Rule 12(b)(6) motion to dismiss, it appears that Dr. Caine vocally objected to the award of any exclusive anesthesia contract to Drs. Hardy, Strong, and Wilson "as same would injure and infringe upon his own anesthesia practice in Hinds General Hospital." Further, Dr. Caine ran against Dr. Hardy for chairmanship of the anesthesiology department and lost by one vote. According to Dr. Caine, by the end of March 1988, the three doctors had reached no exclusive contractual arrangement with the hospital, largely because of his objections and those of other anesthesiologists. Dr. Caine's brief declares that "[c]ertainly, the manner in which a public hospital is operated is of significant public concern." The district court, he charges, "guessed" at the time, place, manner, and content of the statements made.

It cannot be denied that the context in which a public employee expresses himself may be relevant to determining whether the speech expressed a matter of "public concern." *Noyola* v. *Texas Dep't of Human Resources*, 846 F.2d 1021, 1023 (5th Cir. 1988). But context alone cannot transform an inherently self-interested opinion into one that implicates public issues. Had Dr. Caine proclaimed his opposition to Dr. Hardy's exclusive contract proposal from the steps of the Mississippi capitol, the characterization of this speech would not differ. Dr. Caine's alleged remarks concerned solely the internal management of the hospital anesthesiology department and reflected an intra-office dispute rather than an expression of opinion necessary for society to make informed decisions.

One may speculate that the public at large would have an interest in knowing whether Hinds General elected to enter an exclusive contract with only three anesthesiologists. Potential patients might want to know whether or not they would be able to utilize the services of their per-

sonal anesthesiologists at Hinds General, but a similarly attenuated argument was raised and rejected in *Connick* v. *Myers*, 461 U.S. at 148-49, 103 S.Ct. at 1690. The Supreme Court noted that by such reasoning, any activity that occurs within a government office might be deemed a matter of public concern. Such a constitutionalization of primarily intra-office disputes would invite undesirable judicial interference into mundane governmental operations, however, with hardly even a marginal effect on the vigorous debate of public issues secured by the first amendment.

We have rejected this type of argument in our own decisions as well:

> Because almost anything that occurs within a public agency *could* be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made *primarily* in the plaintiff's role as citizen or primarily in his role as employee.

Terrell v. *University of Tex. System Police*, 792 F.2d 1360, 1362 (5th Cir. 1986) (emphasis added); *accord Ayoub* v. *Texas A & M Univ.*, 927 F.2d 834, 837 (5th Cir. 1991). Dr. Caine did not object to the award of an exclusive anesthesiology contract solely, or even primarily, because of his concern as a citizen for the sound management of his local hospital. Rather, his objections stemmed from his perfectly normal, but private interest as a hospital staff member that his job be as remunerative as possible. In *Terrell's* terms, Dr. Caine's speech was made in his role as employee.

The scope of this holding is narrow. In many cases, a district court confronted with sparse allegations of a first amendment violation in the government employment

context may not be able to evaluate the "content, form and context" until discovery or appropriate motions have fleshed out the allegations of a plaintiff's complaint. This is not such a case, however, for we discern no legitimate basis on which to characterize Dr. Caine's allegations, so clearly dependent upon his personal economic stake in the anesthesiology department, as embodying a matter of truly public concern. The district court did not err in concluding that Dr. Caine's proposed amendment failed to state a claim upon which relief could be granted.

V. CONCLUSION

We end where we began. Dr. Caine's summary suspension for reasons of patient safety was procedurally safeguarded in such a way as to satisfy fourteenth amendment due process standards, either under the classic *Mathews* test or under *Zinermon's* wrinkle on the *Parratt/Hudson* doctrine. His opposition to his colleagues' request for an exclusive anesthesiology contract with Hinds County General Hospital was not speech on a matter of public concern protected by the first amendment. The district court therefore properly dismissed his complaint.

AFFIRMED.

JERRE S. WILLIAMS, Circuit Judge, with whom JOHN R. BROWN, Circuit Judge joins, dissenting:

Curtis W. Caine, Jr., M.D. sued M.D. Hardy, M.D. and others on the grounds that the defendants terminated his hospital privileges out of a personal vendetta against him, and in so doing violated his right to procedural due process. Shortly after filing his original complaint, Dr. Caine attempted to amend his complaint to include a claim under the First Amendment. The district court dismissed Dr. Caine's suit under Federal Rule of Civil Procedure 12(b)(6) and denied his request to file an amended complaint

under Rule 15(a). The majority affirms these rulings today. In so doing, the majority acts with unseeming haste in prejudging a case that may have merit. Further, the majority flatly ignores the clear dictates of Rule 12(b)(6) and Rule 15(a). I therefore dissent.

I.

The facts are adequately set out in the panel opinion, 905 F.2d 858, together with the majority en banc opinion. I emphasize two points the majority glosses over.

First, this case was dismissed pursuant to Rule 12(b)(6). We must therefore accept Dr. Caine's allegations as *true*—not as unsubstantiated allegations. Dr. Caine's complaint does not merely "shine[] a different light on the formalities observed," as the majority contends. Instead, the facts alleged in the complaint must be taken as the true light.

Second, because of the Rule 12(b)(6) standard, we must analyze this case as one of a personal vendetta against Dr. Caine, not as a case of a hospital protecting its patients. The majority opinion concludes that Dr. Caine's allegations were merely conclusory. Only if you do not accept them. Our pleading is notice pleading, and Dr. Caine's alleged ample facts to support his conclusion of bias. I can only suggest that the Court consider Wright's relatively elementary law school textbook on Federal Courts, 3d Ed. § 68, pp. 319-326. It will find that this careful summary analysis of correct modern pleading is directly contrary to virtually all of the majority opinion's deprecating analysis of Dr. Caine's complaint.

The animus between Dr. Caine and the defendants, as thoroughly alleged in the complaint, began when Dr. Hardy and his two other partners undertook to gain an exclusive contract to become the only three doctors to provide anes-

thesia services for all of the hospital's patients. This obviously was a move for a monopoly of those services at a public hospital. Dr. Caine vocally opposed such an arrangement. Further, Dr. Caine ran against Dr. Hardy for the chairmanship of the Hinds General Department of Anesthesiology, and lost by only one vote. Shortly thereafter, Dr. Hardy and his partners began telling others that Dr. Caine was a poor doctor. They also sought to have the hospital suspend Dr. Caine's hospital privileges.

An ad hoc investigating committee began procedures to suspend Dr. Caine's hospital privileges. Bias was clearly apparent because Dr. Hardy and one of his partners served on the three person investigating committee. Further, the ad hoc committee did not follow the hospital's bylaws, rules, and regulations. The committee failed to give Dr. Caine the required notice of the hearing and the charges. The ad hoc investigatory committee recommended that the Executive Committee suspend Dr. Caine's hospital privileges. The Executive Committee, of which Dr. Hardy and one of his partners were also members, followed this recommendation. This committee failed to give Dr. Caine notice or opportunity to be heard—thereby violating the medical staff rules. The procedural defaults at all stages are alleged in thorough detail in thirteen pages of the complaint. Thus, we have a case of Dr. Caine's competitors, whom Dr. Caine had publicly criticized and opposed on professional issues, playing a major role in terminating Dr. Caine's privileges without following the required procedures and under what should have been the controlling inhibition of a clear conflict of interest.

All of these facts are denominated by the Court's opinion as resulting in a "conclusory" allegation of bias.

II.

The majority concludes that Dr. Caine has set out no cause of action under the Fifth and Fourteenth Amendments for two reasons. First, the majority asserts that Dr. Caine received all the procedural due process to which he was entitled according to *Mathews*[7] and *Darlak*[8]. The hospital, they assert, suspended him under an exigent circumstance, a concern for patient safety, and therefore did not have to afford Dr. Caine further process before it deprived him of his hospital privileges. The Constitution only required the hospital to give Dr. Caine post-deprivation due process, and Dr. Caine only complains that he received inadequate pre-deprivation due process. He therefore asserts no cause of action. This also means that *Zinermon*[9] is inapplicable because no due process rights were violated.

The majority misapplies *Mathews* because it ignores the procedural status of Dr. Caine's case. At the 12(b)(6) stage, we construe all of Dr. Caine's allegations in the light most favorable to him and accept all of his allegations as true. 5A C. Wright & A. Miller, Federal Practice and Procedure § 1363, at 460-61 (1990). Thus, we must accept Dr. Caine's assertion that the hospital terminated his privileges out of revenge—not out of a concern for personal safety of patients. *Mathews* and *Darlak* are therefore inapplicable. *Darlak* and *Mathews* come into play only when there is a valid legal finding that patient safety is at issue. Only then does revenge become an acceptable risk and pre-deprivation due process is not required. Here, there is no

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[7]*Mathews* v. *Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

[8]*Darlak* v. *Bobear*, 814 F.2d 1055 (5th Cir. 1987).

[9]*Zinermon* v. *Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).

such finding. We instead must accept as true Dr. Caine's allegation that the hospital and the other defendants terminated Dr. Caine's privileges as the core of a personal vendetta.

Second, the majority argues that the *Parratt/Hudson* doctrine,[10] not *Zinermon,* applies to this case. According to the *Parratt/Hudson* doctrine, when the conduct of state actors is random and unauthorized, the state cannot foresee, predict, or prevent a deprivation resulting from such conduct. In such a situation, post-deprivation procedure is the only process constitutionally required. *Zinermon* made a strong and sweeping addition to the *Parratt/Hudson* doctrine. Here is one aspect of the en banc court going seriously wrong. Under *Zinermon, Parratt/Hudson* is not applicable when (1) erroneous deprivation is foreseeable, (2) pre-deprivation process is practicable, and (3) challenged conduct is not "unauthorized," in that the "State delegated to [the state officials] the power and authority to effect the very deprivation complained of" by the plaintiff. *Zinermon,* 494 U.S. at —, 110 S.Ct. at 989-90.

Zinermon, not the narrower *Parratt/Hudson* doctrine, applies to this case. The state can be expected to provide predeprivation remedies because the three *Zinermon* requirements are present. First, the deprivation is foreseeable and comes at a predictable time—when the hospital began termination proceedings. The state can know when the deprivation occurs because procedures are initiated, just as in *Zinermon.* This is not a case of a single state employee action on his or her own as in *Parratt* and *Hudson.* The state in fact acknowledges that such a depriva-

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[10]*See Hudson* v. *Palmer,* 468 U.S. 517, 104 S.Ct. 3149, 82 L.Ed.2d 393 (1984); *Parratt* v. *Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled in part on other grounds, Daniels* v. *Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

tion is foreseeable because it attempted to develop procedural safeguards to protect against erroneous deprivation. *See Plumer* v. *State of Md.*, 915 F.2d 927, 931 (4th Cir. 1990).

Second, pre-deprivation process is practicable because revenge is at issue—at least at this procedural juncture—not patient safety. Dr. Caine did attach to his original complaint a copy of many hospital records pertaining to his termination. He included a copy of a case history which was developed by the investigating committee that charged him with seriously mishandling a patient. Yet Dr. Caine alleges and therefore establishes as fact that this case had been earlier reviewed in a regular "re-credentialing" proceding and at that time no issue was raised with respect to it by the Credentials Committee or the Executive Committee. We still must take Dr. Caine's case as one addressing revenge and not patient safety. The allegations in the complaint are taken as true, not the documents attached to the complaint which are inconsistent with the complaint.

Since the majority considers inconsistent documents outside the complaint, it is engaging in summary judgment procedure without giving Dr. Caine the benefit of filing supplemental sworn evidence. Dr. Caine alleges that he had responses to the charges about the case history in question which prove the charges were advanced as a matter of bias. I remind the Court that "the only information necessary for a decision on [a 12(b)(6)] motion is to be found in the pleading itself; if outside evidence is considered, the motion becomes one for summary judgment." 5A C. Wright & A. Miller, Federal Practice and Procedure § 1363, at 460 (1990) (footnote omitted). The majority ignores the nature of a Rule 12(b)(6) motion. It asks only: do the allegations in the *pleading* state a valid claim for re-

lief? Issues of fact are not decided because the allegations in the complaint are taken as true.

Third, the deprivation was not "unauthorized", "for the state had delegated to its employees 'the power and authority to effect the very deprivation complained of here, . . . and also delegated to them the concomitant duty to initiate the procedural safeguards. . . .' " *Plumer*, 915 F.2d at 931 (quoting *Zinermon*, 494 U.S. at __; 110 S.Ct. at 990); *see also Matthias* v. *Bingley*, 906 F.2d 1047, 1056 (5th Cir.), *modified on other grounds*, 915 F.2d 946 (5th Cir. 1990). In *Parratt* and *Hudson*, on the other hand, "the state employees had no similar broad authority to deprive prisoners of their personal property, and no similar duty to initiate . . . the procedural safeguards required before deprivations occur." *See Zinermon*, 110 S.Ct. at 990.

This case significantly differs from *Parratt* and *Hudson*, as the *Zinermon* case demonstrates. The majority generally limits *Zinermon* strictly to its facts. Yet *Zinermon* controls. In the posture of a 12(b)(6) case Dr. Caine's allegations are true. This is a case of bias. Yet, the majority requires Dr. Caine to come forward with *proof* of bias and decides itself that there was little, if any, bias. This is an overt, and indeed blatant violation of Rule 12(b)(6)—we must accept as true Dr. Caine's allegation that the hospital committees were biased. Thus, in Section III of the opinion for the Court we find a meticulous analysis and reliance upon non-facts as to patient safety. They are non-facts because they are not subject to evaluation as to their veracity. The specific requirements of Rule 12(b)(6) have not been met. They are not sworn, they are contrary to the facts as established under Rule 12(b)(6) by Dr. Caine's pleadings, and also Dr. Caine never had the opportunity to counter them.

The defendants never filed a pleading, thus never denied Dr. Caine's allegations. Yet the Court decides the case by

ignoring his allegations and giving detailed credence to a patient safety issue which is not raised in the case because the defendants never raised it and the plaintiff's pleadings refute it as a factor.

We cannot conclude what result might occur in this case if this were a summary judgment proceeding or there was a trial. Dr. Caine might well have been able to counter the possible evidence of a threat to patient safety. But he had not the slightest obligation to do so at this stage. His pleadings were based upon a claim that Dr. Hardy's and the other defendants' actions were grounded in bias growing out of a personal political dispute. These are the only facts in the posture of this case, and they *must be accepted as true.*

It is incomprehensible to me that this Court can so totally ignore the certain and inescapable status of this case. Contrary to the literal wording of Section 12(b)(6) and the entire corpus of the law interpreting it, the Court converts the 12(b)(6) proceeding to a trial on the merits and without the slightest authority makes its own evaluation of the case based upon its own creation of evidence that does not exist in the pleadings.

This case in no way limits, modifies, or jeopardizes the rule that a hospital can summarily suspend doctor privileges to protect patients. It does not do so because this is not a case about patient safety—at least at this stage—but instead a case about a personal vendetta against a doctor. The majority decision allows a hospital to terminate privileges out of bias, call it patient safety, and then fail to provide the required pretermination procedural due process. This holding constitutes a license to any public agency to deprive someone of a special right by stating a ground which would constitute an emergency—with no proof thereof—and then prevail in a Rule 12(b)(6) dismissal. This bootstrap device can be used in spite of alle-

gations, which must be taken as true, that the motives for the deprivation were wholly discriminatory and that the procedures violated the United States Constitution. The deceased Dr. Caine's rights are entitled to total vindication as this case comes to us. I regret that my powers of persuasion are unable to pierce the smokescreen of the Court's groundless and extralegal analysis.

III.

In Dr. Caine's original petition, he made no First Amendment claim. He later moved for leave of the district court to allow him to file a first amended complaint which included a free speech cause of action. The district court initially granted Dr. Caine's request. The district court later changed its mind and denied the request:

> Finding that the Amended Complaint fails to state a claim upon which relief can be granted, the Court exercises its discretion pursuant to Federal Rule of Civil Procedure 15(a) to deny Caine's Motion for Leave to Amend Complaint. Numerous courts have ruled that leave to amend is properly denied when the complaint, as amended, is subject to dismissal. *See, e.g., Wedgeworth* v. *Fibreboard Corp.*, 706 F.2d 541 (5th Cir. 1983); *Bache Halsey Stuart Shields Inc* v. *Tracy Collins Bank & Trust Co.*, 558 F.Supp. 1042 (D.Utah 1983).

This action by the district court was plain error. Yet, the majority today agrees with the district court, and completely fails to mention, much less consider, the clear text of the rule governing amendments of pleadings, Federal Rule of Civil Procedure 15(a).

The first sentence of Rule 15(a) provides in relevant part that "[a] party may amend the party's pleading once *as a matter of course* at any time before a responsive plead-

ing is served." (emphasis added.) The defendants have never filed a responsive pleading in this case; only a Rule 12(6)(b) motion was filed.[11] *See Zaidi* v. *Ehrlich*, 732 F.2d 1218, 1219-20 (5th Cir. 1984); *see also* Fed.R.Civ.P. 7(a). Dr. Caine under all federal procedural authority should have been allowed to amend his pleading once "as a matter of course." Rule 15(a) requires no court permission when no responsive pleading has been filed. The district court thus had no discretion to deny Dr. Caine's request. "[A] party may amend a pleading once *without the permission of the court or the consent of any other parties to the action if he does so . . . before a responsive pleading has been served.*" 6 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1480, 574-75 (1990) (footnotes omitted) (emphasis added). It is axiomatic that neither a 12(b)(6) motion nor a summary judgment motion is a "responsive pleading". Dr. Caine did not even need to make a motion to file an amended complaint. He already had that right under Rule 15(a). The fact that Dr. Caine filed a motion to amend did not affect his absolute right to file an amended complaint. "If a party erroneously moves for leave to amend before the time for amending as of course has expired, . . . the amendment should not be handled as a matter addressed to the court's discretion *but should be allowed as of right.*" *Id.* at § 1482, 580 (footnote omitted) (emphasis added); *see also Zaidi*, 732 F.2d at 1220.

The majority completely ignores the clear and simple dictate of Rule 15(a): Dr. Caine could amend his original petition without court permission because no responsive pleading had been filed. Courts at this stage of litigation

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[11]In their 12(b)(6) motion, defendants added a routine alternative motion for summary judgment. But the defendants and the court treated the motion as a 12(b)(6) motion throughout, and the court's judgment was based upon 12(b)(6).

do not evaluate under Rule 12(b)(6) the right to amend a complaint, and the district court did not purport to do so. Thus, the district court committed plain error when it prohibited Dr. Caine from filing an amended complaint. The two cases cited by the district court are clearly inapplicable here because in those cases the defendants had filed responsive pleadings. In such a situation, the second sentence of Rule 15(a) applies: "Otherwise a party may amend the party's pleading only by the leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Only when a responsive pleading has been filed can the court determine if the amended pleading would survive a motion to dismiss under Rule 12(b)(6).

Dr. Caine wished to amend for an extremely serious purpose—to state and undertake to prove a First Amendment claim. "A state may not discharge an employee for exercising his right to free speech on matters of public concern." *Page* v. *De Laune*, 837 F.2d 233, 237 (5th Cir. 1988); *see also Connick* v. *Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708 (1983). Whether his speech addressed a matter of public concern must be determined by the "content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690 (footnote omitted). Yet, the majority today countenances denying Dr. Caine the opportunity to develop the whole record because it has decided for him that he could make no claim to have spoken out on a matter of public concern. This conclusion, again, is overt legal error. The alleged and uncontroverted facts reveal a real likelihood that Dr. Caine could make a valid First Amendment claim.

Dr. Caine spoke out about the quality of health care at the public hospital. The quality of health care inescapably is of public concern. *Frazier* v. *King*, 873 F.2d 820, 825

(5th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 502, 107 L.Ed.2d 504 (1989). Dr. Caine's outspoken opposition to the Hardy monopoly move can be treated as an unworthy free speech claim only by an inexplicable desire that the case presented to the court were something other than what it is. The majority fastened upon his allegation that his concern was about loss of work. This allegation, establishing a property interest in his right to sue, cannot be found as a self limiting pleading in the light of his proposed amendment raising the free speech issue. Dr. Caine was speaking out concerning the actions of public officials. Further, the actions would create a monopoly and would bar members of the public from using their own doctors in a public hospital. In short, Dr. Caine asked to allege that he undertook to speak out on issues having clear ramifications that deeply involved matters of public concern. Doctors are intimately associated with such matters. The welfare of the patients—about which Dr. Caine spoke—is always a matter of "serious public concern." *Price* v. *Brittain*, 874 F.2d 252, 258 (5th Cir. 1989).

The opinion of the Court denies Dr. Caine the opportunity to assert these claims and develop the record. Instead, it has decided for Dr. Caine what he did and did not say and why. It therefore improperly denies him the chance to develop the content, form, and context of his advocacy. Further, the majority focuses upon motive. A strong element of personal concern necessary to establish the right to sue does not remove speech from the realm of public concern. *See Thompson* v. *City of Starkville*, 901 F.2d 456, 465-66 (5th Cir. 1990). Courts still must fully analyze the content, form, and context of speech as the Supreme Court required in *Connick*.

IV.

On this record established law requires that the case be reversed and remanded. Dr. Caine's representatives should be granted the chance to develop their claims that the defendants violated Dr. Caine's Constitutional procedural rights under *Zinermon* and the critical free speech right of advocacy as to a matter of obvious public concern. Yet these critical assertions of Constitutional default are treated as trivia by the en banc Court, so much so that no denial or explanation or even answer is permitted. In what appears to be an overwhelming desire in the Court to hold against Dr. Caine, even before the facts are developed, the Court simply ignores the firmly established law which governs this case. There is no doubt about the controlling law of Federal Rules of Civil Procedure 12(b)(6) and 15(a). So the Court in its wholly inappropriate ad hoc drive to deny whatever rights Dr. Caine claimed and might establish simply ignores the law and the procedural posture of the case. "Such result-oriented decision making can only erode respect for the federal judiciary." *Christophersen* v. *Allied Signal Corp.*, 939 F.2d 1106, 1137 (5th Cir. 1991) (King, J. dissenting opinion).

I must register a strong dissent.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-4470

D.C. Docket No. CA J 89 0064 (B)

CURTIS W. CAINE, JR., M.D. - - *Plaintiff-Appellant,*

v.

M.D. HARDY, M.D., et al. - - *Defendants-Appellees.*

Appeal from the United States District Court for the Southern District of Mississippi

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JUDGMENT—Filed September 26, 1991

Before CLARK, Chief Judge, BROWN, POLITZ, KING, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER and BARKSDALE, Circuit Judges.*

J U D G M E N T

This cause came on to be heard on rehearing en banc and was argued by counsel.

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*Judge Emilio M. Garza became a member of the Court after this case was heard en banc but elected not to participate in the decision; Judge Sam D. Johnson took senior status after the case was heard but before this opinion was rendered and did not participate in the decision of this case.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed by the Court en banc.

It Is Further Ordered that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

September 26, 1991

Williams, Circuit Judge, with whom, Brown, Circuit Judge, joins, dissenting.

Issued As Mandate: October 18, 1991

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 89-4470

CURTIS W. CAINE, JR., M.D., - - *Plaintiff-Appellant,*

v.

M. D. HARDY, M.D., et al., - - *Defendants-Appellees.*

August 3, 1990.

Appeal from the United States District Court for the Southern District of Mississippi; William H. Barbour, Jr., District Judge, Presiding.

Before CLARK, Chief Judge, GEE, POLITZ, KING, JOHNSON, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER and BARKSDALE, Circuit Judges.

SUGGESTION FOR REHEARING EN BANC

(Opinion June 27, 1990, 5 Cir., 1990, 905 F.2d 858)

BY THE COURT:

A member of the Court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 89-4470

CURTIS W. CAINE, JR., M.D. - - *Plaintiff-Appellant,*

v.

M. D. HARDY, M.D., WOODIE L. MASON, et al., - - - - - *Defendants-Appellees.*

June 27, 1990.

Physician who lost his staff privileges at public hospital brought suit against hospital and certain physicians claiming deprivation of his right to due process. The United States District Court for the Southern District of Mississippi, 715 F.Supp. 166, William Henry Barbour, Jr., Chief Judge, dismissed lawsuit for failure to state claim, and physician appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) *Parratt/Hudson* doctrine, that no § 1983 claim can be stated if state provides plaintiff with adequate postdeprivation remedy, was inapplicable to claim that public hospital had deprived physician of predetermination due process if physician's suspension was not based on threat to patient safety, and (2) physician should have been alowed to amend his complaint to add claim of violation of First Amendment rights.

Reversed and remanded.

Edith H. Jones, Circuit Judge, filed dissenting opinion.

1. Civil Rights Key No. 206(3), 209

Under *Parratt/Hudson* doctrine, state cannot be held liable for denial of predeprivation procedural due process

at hands of state actor if deprivation is random and not authorized by state policy and if state provides claimant with adequate postdeprivation remedy. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14.

2. Constitutional Law Key No. 275(1.5)
Hospitals Key No. 6

Hospitals need not provide doctors with full procedural due process before initially suspending medical staff privileges if suspension is imposed to protect hospital's patients. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14.

3. Civil Rights Key No. 235(1)
Hospitals Key No. 6

Physician who alleged that termination of his hospital staff privileges was motivated by other physicians' personal vendetta against him and not by hospital's interests in protecting patients' safety stated claim for deprivation of procedural due process during initial suspension procedure. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend, 14.

4. Civil Rights Key No. 209

Parratt/Hudson doctrine is restricted to cases where it truly is impossible for state to provide predeprivation procedural due process before person unpredictably is deprived of his liberty or property through unauthorized conduct of state actor; when *Parratt/Hudson* doctrine does not apply, § 1983 plaintiff can state claim for state's failure to provide predeprivation procedural due process. U.S.C.A. Const. Amend. 14; 42 U.S.C.A. § 1983.

5. Constitutional Law Key No. 275(1.5)
Hospitals Key No. 6

Assuming that physician's care did not involve any threat to safety of patients, physician was entitled to pre-

deprivation due process even before his public hospital privileges were suspended, where it was clear that state could have provided physician with full procedural due process in pretermination stage before his privileges finally were taken away from him; move toward suspension and then termination was one that inevitably resulted in proceedings held before state actors, and state actors' actions were not unauthorized. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14.

6. Federal Civil Procedure Key No. 825

Physician should have been allowed, as matter of course, to amend his complaint against hospital and other physicians to state First Amendment claim after defendants filed motion to dismiss complaint or for summary judgment, where defendants had not filed any responsive pleading to complaint. Fed.Rules Civ.Proc. Rule 15(a), 28 U.S.C.A.; U.S.C.A. Const. Amend. 1.

Appeal from the United States District Court for the Southern District of Mississippi.

Before BROWN, WILLIAMS and JONES, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Curtis W. Caine, Jr., M.D. appeals a district court order dismissing his § 1983 lawsuit against a hospital and the individuals who participated in the termination of Caine's hospital staff privileges. 715 F.Supp. 166.

I.

Because this appeal is from an order dismissing Caine's lawsuit, the facts alleged in Caine's lengthy complaint are taken as true. *See, L & L Oil Co.* v. *Murphy Oil Corp.*, 674 F.2d 1113, 1115 (5th Cir. 1982).

Caine is an anesthesiologist who in 1983 was granted staff privileges at Hinds General Hospital, a public hos-

pital in Jackson, Mississippi. As he was required to do by hospital bylaws, Caine reapplied for staff privileges at two year intervals. Caine's applications were reviewed, and each time his privileges were renewed.

Three other anesthesiologists practicing at Hinds General were engaged in a partnership. These partners were M.D. Hardy, M.D.; Hardy's spouse Darilynn Wilson, M.D.; and Robert Strong, M.D. In 1987 and 1988, the members of this partnership sought an exclusive contract to perform anesthesia services at Hinds General. Caine and other independent anesthesiologists practicing at Hinds General objected to the proposed exclusive contract. It was not granted. Caine also ran against Hardy for the Chairmanship of the Hinds General Department of Anesthesiology. Hardy won the election by one vote.

Caine alleges that Hardy and his partners not long thereafter initiated an investigation into Caine's practice at Hinds General that resulted in Caine's staff privileges being suspended by the Executive Committee, then revoked by the Executive Committee, and finally formally terminated by the Hinds General Board of Trustees. Caine claims that he was denied procedural due process of law under the Fourteenth Amendment at each step.

II.

Caine sued the hospital and the individuals involved in the suspension process in federal district court. He alleged civil rights claims under 42 U.S.C. § 1983 and the Health Care Quality Improvement Act of 1986 (the HCQIA), 42 U.S.C. § 11101, *et seq.* Without filing an answer, appellees filed a motion to dismiss for failure to state a claim or for summary judgment. Caine filed a motion for leave to amend his complaint in order to assert free speech claims under the First Amendment to the United States Constitu-

tion. Caine's motion initially was granted by the district court. Later, however, the district court reversed its decision and refused to allow Caine to amend his complaint. The court then granted appellees' motion to dismiss.

[1] The district court, relying on established § 1983 precedent, held that under the *Parratt/Hudson* doctrine[1] Caine could not state a § 1983 claim because the state provided him with an adequate postdeprivation remedy. Under the *Parratt/Hudson* doctrine, a state can not be held liable for a denial of predeprivation procedural due process at the hands of a state actor if the deprivation is random and not authorized by state policy and if the state provides a claimant with an adequate postdeprivation remedy. The court held that the Mississippi procedure provided Caine an avenue of appeal from the action of the hospital to the Mississippi Chancery Court. The court found this to be an adequate postdeprivation remedy.[2] Because Caine did not

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[1]The *Parrat/Hudson* doctrine takes its name from two Supreme Court cases: *Parratt* v. *Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (overruled in part, not relevant here, by *Daniels* v. *Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)) and *Hudson* v. *Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984).

[2]Without deciding this issue, we note that we have considerable doubt that Mississippi's Chancery Court would provide an adequate postdeprivation remedy. Caine would have had only thirty days to file his appeal to the Chancery Court. Miss.Code Ann. § 73-25-27. Caine also would not have been entitled to a jury trial although there were critical fact issues. We have noted before that a district court's conclusion that this Chancery Court remedy was adequate "appears to be sound," *Schuster* v. *Martin*, 861 F.2d 1369, 1374 n. 11 (5th Cir. 1988), but we have never so held. Nonetheless, because we decide the present case on other grounds, we need not resolve the possible conflict between the statement in *Schuster* and our view of the adequacy of Mississippi's Chancery Court remedy.

appeal to the Chancery Court, the district court held that he had not availed himself of available, adequate postdeprivation relief. He could not, therefore, state a § 1983 claim.

III.

[2, 3] We previously have weighed the competing interests of physicians and hospitals, and have concluded that hospitals need not provide doctors full procedural due process before initially suspending medical staff privileges if the suspension is imposed to protect the hospital's patients. *See Darlak* v. *Bobear*, 814 F.2d 1055, 1063 (5th Cir. 1987). A fair reading of Caine's complaint, however, indicates that he claims that the initial suspension was motivated by appellees' personal vendetta against him and not by the hospital's interest in protecting patient safety. Because we must accept this allegation as true, we must conclude that Caine does not come within the *Darlak* rule, but instead was entitled to full procedural due process even in the decision to suspend. *See Northeast Georgia Radiological Assoc.* v. *Tidwell*, 670 F.2d 507, 511 (5th Cir. 1982) ("medical staff privileges embody such a valuable property interest that notice and hearing should be held prior to its termination or withdrawal, absent some extraordinary situation where a valid government or medical interest is at stake."). But, regardless of whether Caine was entitled to full procedural due process at this initial stage, he certainly was entitled to full procedural due process after the suspension because the hospital could no longer have any pressing need to protect its patients from him.

Although a doctor is entitled to full procedural due process before his or her staff privileges are revoked, that entitlement has not in the past automatically established a § 1983 claim if privileges are suspended without procedural due process. Under the *Parratt/Hudson* doctrine, a state

could not be held liable for a state employee's "random and unauthorized" failure to provide predeprivation procedural due process if the state provided an adequate postdeprivation remedy for persons who were deprived of their property without due process of law. *See, Martin* v. *Dallas County, Texas*, 822 F.2d 553, 555 (5th Cir. 1987). This Court has applied the *Parratt/Hudson* doctrine even where the state employee depriving the § 1983 claimant of predeprivation procedural due process was a highranking state employee who was charged with providing procedural due process for that claimant. *See Holloway* v. *Walker*, 790 F.2d 1170, 1173 (5th Cir.1986). Other Courts of Appeals have applied the *Parratt/Hudson* doctrine less broadly than we. *See, e.g. Watts* v. *Burkhart*, 854 F.2d 839 (6th Cir.1988).

But the controlling constitutional authority has changed. After the district court had dismissed Caine's complaint, the Supreme Court decided *Zinermon* v. *Burch*, — U.S. —, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). The Court noted that it granted certiorari in *Zinermon* to resolve conflict among the Courts of Appeals over the scope of the *Parratt/Hudson* doctrine. *Zinermon*, 110 S.Ct. at 978. *Zinermon* controls appellant Caine's case. Its holding requires reconsideration of this Court's *Parratt/Hudson* jurisprudence.

Zinermon was a § 1983 suit brought by Darrell Burch, a man who had been detained in the Florida state mental hospital. Burch had been found wandering along a highway, hurt and disoriented. After he was diagnosed as a paranoid schizophrenic, state employees secured Burch's signature on forms requesting voluntary admission to the hospital and authorizing treatment by the hospital staff. Burch was kept at the hospital for five months. Upon his release, Burch sued the hospital and its staff in federal court under § 1983. Burch claimed that he overtly was in-

competent when he signed the admission and treatment authorization forms. He alleged that by inducing him to commit himself under the voluntary commitment procedure instead of initiating involuntary commitment proceedings, the hospital deprived him of his liberty without procedural due process.

The district court dismissed Burch's claim, holding that under the *Parratt/Hudson* doctrine Burch could not establish a claim based upon the state's failure to provide him with predeprivation procedural due process because Florida's postdeprivation tort remedies were adequate. This holding was affirmed by a panel of the Eleventh Circuit. *Burch* v. *Apalachee Community Mental Health Services, Inc.*, 804 F.2d 1549, 1551 (11th Cir.1986) *vacated*, 812 F.2d 1339 (1987). After en banc rehearing, however, the Eleventh Circuit reversed the district court's dismissal and held that Burch's § 1983 claim was not subject to the *Parratt/Hudson* doctrine. *Burch* v. *Apalachee Community Mental Health Services, Inc.*, 840 F.2d 797, 803 (11th Cir. 1988)(en banc).

The Supreme Court affirmed the en banc Eleventh Circuit decision. The Court found that *Zinermon* was not controlled by the *Parratt/Hudson* doctrine for three reasons. First, the deprivation of Burch's liberty did not occur at an unpredictable, but rather at a predictable, time. It was clear that "[a]ny erroneous deprivation will occur, if at all, at a specific, predictable point in the admission process—when a patient is given admission forms to sign." *Zinermon*, 110 S.Ct. at 989. Second, the Court found that it was not impossible for Florida to provide predeprivation due process in the mental health care voluntary admission procedure. Third, the Court held that the state employees' conduct was not "unauthorized" as that term was used in *Parratt* and *Hudson*. The Court explained:

> The State delegated to [the state employees] the power and authority to effect the very deprivation complained of here, Burch's confinement in a mental hospital, and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement. In *Parratt* and *Hudson*, the state employees had no similar broad authority to deprive prisoners of their personal property, and no similar duty to initiate (for persons unable to protect their own interests) the procedural safeguards required before deprivations occur. The deprivation here is "unauthorized" only in the sense that it was not an act sanctioned by state law, but, instead, was a "depriv[ation] of constitutional rights . . . by an official's abuse of his position."

Zinermon, 110 S.Ct. at 990 (citation omitted). Because Burch's claim was not controlled by the *Parratt/Hudson* doctrine, the Court held that Burch properly stated a § 1983 claim for the state's failure to provide him predeprivation procedural due process.

[4] The lesson of *Zinermon* is that the *Parratt/Hudson* doctrine is restricted to cases where it truly is impossible for the state to provide predeprivation procedural due process before a person unpredictably is deprived of his liberty or property through the unauthorized conduct of a state actor. In *Zinermon*, however, the deprivation was not unpredictable. It was not impossible, therefore, for the state to provide predeprivation procedural due process. Since the state actor who caused the deprivation was authorized to take the action that caused the deprivation, the *Parratt/Hudson* doctrine did not apply. It follows that when the *Parratt/Hudson* doctrine does not apply, a § 1983 plaintiff can state a claim for the state's failure to provide predeprivation procedural due process.

Our interpretation of *Zinermon* is supported by the Supreme Court's treatment of two cases that reached the Court after *Zinermon*. In *Fields* v. *Durham*, 856 F.2d 655 (4th Cir.1988), a state college administrator was discharged under the state's dismissal procedures, although the procedures provided to the administrator allegedly were faulty. The Fourth Circuit held that the *Parratt/Hudson* doctrine applied and that the administrator could not state a § 1983 claim for the state's failure to provide him predeprivation procedural due process. The Supreme Court vacated the Fourth Circuit's opinion and remanded the case to the Fourth Circuit "for further consideration in light of *Zinermon*. . . ." *Fields* v. *Durham*, — U.S. —, 110 S.Ct. 1313, 108 L.Ed.2d 489 (1990).

The Supreme Court at the same time ordered the Seventh Circuit to reconsider a recent case involving facts significantly analogous to the facts alleged by Dr. Caine. *Easter House* v. *Felder*, — U.S. —, 110 S.Ct. 1314, 108 L.Ed.2d 490 (1990). The en banc Seventh Circuit had held that under the *Parratt/Hudson* doctrine an adoption agency could not state a § 1983 claim for the state's failure to provide the agency with procedural due process before state employees, as part of an alleged conspiracy with a rival adoption agency, deprived Easter House of its state operating license. *Easter House* v. *Felder*, 879 F.2d 1458, 1460-61, 1474 (7th Cir.1989)(en banc). In both *Fields* and *Easter House*, the deprivations were predictable, the state could have provided predeprivation precedural due process, and the deprivations occurred at the hands of state actors who were authorized by the state to take the actions that caused the deprivations. Thus, under *Zinermon*, neither *Fields* nor *Easter House* should be controlled by the *Parratt/Hudson* doctrine.

[5] We conclude that the present case is controlled by *Zinermon* and is not subject to the *Parratt/Hudson* doc-

trine. Caine could readily have been supplied with adequate procedures even before suspension since under the posture of the case the facts accepted as true show suspension without any threat to the safety of patients. But in any event, it is also clear that the state could have provided Caine with full procedural due process in the pretermination stage before his privileges finally were taken away from him. Further, it was obvious that the move towards suspension and then termination would inevitably result in proceedings directed at removal of staff privileges held before state actors. Thus, the deprivation of the present case was more predictable than were the deprivations in *Fields* and *Easter House*. Finally, the state actors' actions in the present case were not unauthorized. Appellees were delegated the power by the state to deprive doctors such as Caine of the staff privileges. That the deprivation in Caine's case may have resulted from "an official's abuse of his position," in the words of *Zinermon*, does not make appellees' actions unauthorized.

We hold, therefore, that the *Parratt/Hudson* doctrine does not bar Caine's § 1983 claim.

IV.

The district court also dismissed Caine's claims under the HCQIA, holding that this Act "was not intended to . . . provide a disciplined physician with a private cause of action." Caine does not allege error in the district court's ruling. This issue is not before us.

V.

[6] Caine claims that the district court erred in refusing to allow him to amend his complaint to add a claim under the First Amendment to the United States Constitution. He argues that his privileges were revoked "in re-

taliation for . . . [his] vocal opposition to the proposed exclusive anesthesia contract at Hinds General, the failure of Dr. Hardy to call regular Anesthesia Department meetings as required by Medical Staff Bylaws, and [his] opposition to Dr. Hardy in the election for Chairman of the Anesthesia Department." The district court refused Caine's proposed amendment after initially accepting it. The court held that the amendment failed to state a claim because Caine did not "establish that the speech involved was a matter of public concern." Caine urges that his speech was a matter of public concern because it involved the operation of a public hospital.

Fed.R.Civ.P. 15(a) provides, in pertinent part, that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . ." Appellees never filed a responsive pleading, but instead first filed their motion to dismiss for failure to state a claim or for summary judgment. These motions are not pleadings. *Zaidi* v. *Ehrlich*, 732 F.2d 1218, 1219-20 (5th Cir.1984). *See also* Fed.R.Civ.P. 7 and 3 J. Moore, Moore's Federal Practice 15.07[2] (2d ed. 1989). Under the terms of F.R.Civ.P. 15(a), therefore, Caine should have been permitted "as a matter of course" to amend his complaint. *See Zaidi*, 732 F.2d at 1220. The district court erred in not allowing this amendment.

VI.

We reverse the district court's dismissal of appellant Caine's § 1983 claims and reverse the district court's refusal to allow Caine to amend his complaint.

REVERSED AND REMANDED.

EDITH H. JONES, Circuit Judge, dissenting:

With all due respect to my colleagues, I strenously disagree with their conclusion that *Zinermon* v. *Burch*, — U.S. —, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), "controls" this

case. Depending on our interpretation of Dr. Caine's procedural due process allegations, *Zinermon* is either irrelevant or distinguishable. These terse conclusions require elaboration, because *Zinermon* undoubtedly complicated an already overloaded procedural due process jurisprudence.

The majority accept Dr. Caine's unblushing claim that his initial suspension was "motivated by appellees' personal vendetta against him" and not by the hospital's interest in promoting patient safety. Dr. Caine's 50-page complaint nowhere denies that he was in fact suspended under a hospital regulation which authorizes summary suspension when a practitioner's conduct "requires that immediate action be taken to protect the life of any patient(s) or to reduce the substantial likelihood of immediate injury or damages to . . . any patient . . ." Article VI § 2a, Hines General Hospital Medical Staff By-Laws Rules and Regulations (1987).[1] Among the voluminous documents attached to his complaint is a letter from the hospital invoking Article VI § 2a to support its initial suspension of his medical privileges. I cannot think that we are bound by Rule 12(b)(6) to defer to the plaintiff's characterization of his claim even though it is contradicted by a "true and correct copy" of one of his allegedly supporting documents. But whether or not we assume that Dr. Caine was summarily suspended, I contend that he received all the process that was constitutionally due and has not stated a claim for relief.

I.

In the event that Dr. Caine was summarily suspended "to protect the life of patients or prevent imminent danger

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[1]The entire record in the trial court was sealed by agreed order. It should not breach the parties' desire for confidentiality, however, to reveal that the charges against Dr. Caine were of a most serious nature.

to patients", he was not constitutionally entitled to a pre-deprivation hearing. Both the Supreme Court and this court have long struck the procedural due process balance so as to dispense with a requirement for pre-deprivation remedies when there is a need for immediate state action. *Parratt* v. *Taylor*, 451 U.S. 527, 538-39 101 S.Ct. 1908, 1914, 68 L.Ed.2d 420 (1981) overruled in part *Daniels* v. *Williams*, 474 U.S. 377, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Darlak* v. *Bobear*, 814 F.2d 1055 (5th Cir.1987). In such circumstances, "the Court has held that a statutory provision for a post-deprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process." *Zinermon*, __ U.S. at __, 110 S.Ct. at 984. The majority apparently would agree that this rule forecloses a procedural due process claim by Dr. Caine if (a) he was suspended pursuant to Article VI § 2a and (b) he was furnished a post-deprivation hearing.

The allegations in Dr. Caine's complaint and the records attached to it fulfill both of these conditions, demonstrating that he received both pre- and post-deprivation procedural protections. Dr. Caine's summary suspension was preceded by two conferences with fellow anesthesiologists from the hospital who had been asked to conduct the investigation into his handling of a particular anesthesia case. After Dr. Caine objected to being caught unaware by the allegedly inquisitorial tone of the first meeting, he asked for and participated in a second conference five days later.

Although Article VII of the hospital bylaws provided a right to a formal post-suspension hearing within seven days after summary action, Dr. Caine's complaint and exhibits demonstrate that he secured immediate legal advice, sought additional informal meetings with the hospital investigating committees, which were granted, and requested several continuances of the formal hearing. In the end, he declined to go through with the formal evidentiary hearing

and did not avail himself of Mississippi's judicial review of the suspension. Miss.Code Ann. § 73-25-27. These facts place his case on all fours with *Darlak*, 814 F.2d at 1055, in which we rejected a physician's due process challenge to summary suspension followed by a more severe suspension. As in *Darlak*, Dr. Caine had the chance to defend himself informally before being summarily suspended. 814 F.2d at 1062-63. As in *Darlak*, Dr. Caine could have, but did not, invoke a formal due process hearing just after summary suspension. Thus, assuming that Dr. Caine was summarily suspended and relying on the facts pleaded and documents attached to his complaint, it is plain that *Darlak* forecloses any procedural due process claim. It is also plain that *Zinermon* has no application to a due process claim founded on a summary suspension of medical privileges.

II.

Even if we assume that Dr. Caine's termination constituted an abuse of the summary suspension procedure or arose from a non-summary action, I cannot agree that he has stated a claim by the conclusory assertion that he was "denied procedural due process." The documents attached to his complaint prove instead that the hospital provided detailed procedures to protect the rights of a physician under investigation and that both parties, assisted by counsel, referred to these procedures at every turn during the six-month period between the first complaint about Dr. Caine and the board of trustees' final decision on suspension. Neither on the facts nor on the law is this case at all similar to *Zinermon*, nor does it warrant the majority's broad suggestion that *Zinermon* has significantly changed our circuit's due process jurisprudence.

I continue to agree with the trial court that according to the *Parratt/Hudson* doctrine, Dr. Caine stated no pro-

cedural due process claim because he had an adequate post-termination remedy by way of hospital procedures as well as a state lawsuit for review of the hospital's suspension order. Miss. Code Ann. § 73-25-27. According to the majority, *Zinermon* has changed this rule. I agree that *Zinermon* adds a wrinkle to our current analysis of due process violations, but the import of the case must be judged from its unique facts.

Zinermon undertook to determine whether a due process violation was alleged by a man whose "voluntary commitment" to a Florida mental institution was actually involuntary because he was plainly incompetent at the time he signed the necessary papers. He alleged that the hospital officials knew or should have known of his condition and should have utilized the procedurally safeguarded involuntary commitment process. The Eleventh Circuit split over several issues, including whether a state tort suit for false imprisonment afforded an adequate post-deprivation remedy, i.e., all the process that was due under the *Parratt/Hudson* doctrine.

The Supreme Court started with the proposition that ordinarily the state may not take a person's life or liberty until *after* it has provided due process of law. U.S. Constitution Article XIV.[2] The nature of the process that is due before a deprivation varies with the circumstances. *Matthews* v. *Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).[3] If, however, a deprivation occurs

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[2]The well-recognized exception to the requirement of a pre-deprivation remedy is that of public safety regulation described in part I above. *Zinermon*, ___ U.S. ___, 110 S.Ct. 978, 108 L.Ed.2d 100 (1990).

[3] *Matthews* specifies that three factors must be weighed in determining the procedural protections the Constitution requires in a particular case: the private interest that will be affected by the

(Continued on next page.)

in a way that the state could not have been expected to anticipate, for instance, because a state actor took property to which he was not entitled, the only process constitutionally required is an adequate post-deprivation remedy. *Parratt*, 451 U.S. at 543-44, 101 S.Ct. at 1916-17; *Hudson* v. *Palmer*, 468 U.S. 517, 104 S.Ct. 3195, 82 L.Ed.2d 393 (1984). The Court in *Zinermon* portrayed *Parratt/Hudson* as a "special case of the general *Matthews* v. *Eldridge* analysis, in which post-deprivation remedies are all the process that is due, simply because they are the only remedies the state could be expected to provide." *Zinermon*, 110 S.Ct. 985.[4]

Zinermon analyzed the state officials' conduct in admitting Burch to the mental hospital and concluded that *Parratt/Hudson* did not vindicate the adequacy of a post-deprivation remedy because the voluntary commitment procedure presented both a high risk of erroneous deprivation of a mentally ill person's liberty, and the substantial likelihood that minimal further procedural safeguards could readily have avoided the deprivation. *Zinermon/Hudson* requires a hard look at a *Parratt/Hudson* claim to determine whether the state official's conduct, under all the circumstances of the deprivation, could have been adequately foreseen and addressed by procedural safeguards. If it

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(Continued from preceding page.)

official action; the risk of an erroneous deprivation of the interest through the procedures used, and the probable value of additional procedural safeguards; and the government's interest, including the function involved and the burdens that additional procedural requirements would entail. *Id.*

[4]Also, "*Parratt* is not an exception to the *Matthews* balancing test, but rather an application of that test to the unusual case in which one of the variables in the *Matthews* equation—the value of pre-deprivation safeguards—is negligible in preventing the kind of deprivation at issue." *Zinermon*, 110 S.Ct. at 985.

could, then the case requires classic *Matthews* balancing and has stated a claim for relief. *Zinermon* did not, however explicitly or implicitly disavow the *Parratt/Hudson* doctrine, nor did it portend that any alleged violation of procedural due process undertaken within the scope of an established and articulated state regulatory framework automatically falls outside the purview of *Parratt/Hudson*. *Zinermon* employs and hence requires case-by-case analysis of the deprivation at issue. *See Zinermon*, O'Conner, dissenting, — U.S. —, 110 S.Ct. at 995.

The majority and I do not differ in the general conclusion that *Zinermon* has restricted *Parratt/Hudson* to cases in which "it truly is impossible to provide pre-deprivation safeguards." I disagree strongly, however, that *Zinermon* breathes life into Dr. Caine's complaint. Referring to the three reasons why the *Zinermon* court distinguished *Parratt/Hudson*, 110 S.Ct. at 989-90, the majority first says that "the state could have provided Dr. Caine with full procedural due process before finally removing his hospital privileges."[5] They next suggest that this deprivation was "foreseeable." Third, they find that the state actors' conduct, as in *Zinermon*, was not "unauthorized," because hospital personnel were "delegated power by the state to deprive actors such as Caine of the staff privileges." This third conclusion seems tantamount to suggesting that *any error* committed during a state due process scheme cannot be random and unauthorized because state actors were "authorized" to effectuate the scheme. All of these analogies to *Zinermon* are too broad.

First, I see no way in which the state could have articulated more explicit procedural safeguards to protect Dr.

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[5]For the sake of argument only, I shall assume with the majority that Dr. Caine was not sanctioned pursuant to Article VI § 2(a) of the hospital regulations for the safety of patients.

Caine against the specific risk that his privileges would be suspended because of his peers' anti-competitive motives. *See Zinermon,* 110 S.Ct. at 987-88. The hospital regulations state when, how and for what reasons doctors may be disciplined. They permit immediate suspension only to protect the safety of patients and then only after an investigation. Alternately, they provide for a formal investigation and informal hearings, followed by a full evidentiary hearing and possible appeal to the hospital board of trustees. A final resort may be had to prompt state judicial review.[6]

In *Zinermon,* the state's provision for voluntary commitment without procedural protections was *explicit* and the risk of erroneous application of that procedure undoubtedly high, because it operated against people who already lacked their full faculties. Thus, the Court's conclusion that Mr. Burch was subjected to a serious risk of deprivation of his liberty is hardly surprising. In Florida, "[t]he staff are the *only* persons in a position to take notice of any misuse of the voluntary admissions process, and to insure that the proper procedure is followed." *Zinermon,* 110 S.Ct. 988. Dr. Caine clearly is not "victimized" by the hospital regulations. He never alleges that those regulations are infirm. Rather, he alleges that the regulations were *violated,* purportedly at every stage, by the dozen or so state actors responsible for enforcing them. The violations occurred even though attorneys represented both sides. *Zinermon* characterizes the risk facing the patient as one of an erroneous deprivation *made possible by Florida's voluntary commitment procedures.* The risk to Dr. Caine, however, sprang only from wanton and inten-

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[6]The majority's swipe at the "adequacy" of this Mississippi state review is gratuitous, but because it is mere dicta, I shall not discuss it further.

tional alleged violations of inarguably controlling state regulations.

The means of deprivation in *Zinermon* cannot be untied from the Court's analysis that a more complete state regulatory scheme could have prevented the deprivation. Thus, the addition to the scheme of a simple certification by one of the admitting officers that the patient was competent to commit himself would seem adequate to cure the problem. *Zinermon*, 110 S.Ct. at 988. The majority engage here in no such analysis, nor can they. There is no deficit in the hospital's procedural regulations. As previously stated, the doctor challenges solely the bias of his peers and their violation of those regulations. These allegations naturally disprove the majority's third *Zinermon* based conclusion that the "state actors' actions in the present case were not unauthorized." (emphasis added.) Of course they were! Investigatory and judicial bias in implementing the regulations is always unauthorized, if they are not alleged to flow from the regulations themselves. *Holloway* v. *Walker*, 784 F.2d 1287, 1292-93 (5th Cir. 1986). Nearly every paragraph of Dr. Caine's 50-page complaint concludes with the assertion that the hospital actors' conduct violated a particular provision of the regulations. The majority have already assumed away the only reason authorized by the regulations for immediate suspension of hospital privileges, *i.e.*, to protect the safety of patients. Hence it follows that any other action which brought about that result had to be *unauthorized* by the regulations. In *Zinermon*, by contrast, the voluntary admission of the patient may have been an abuse of judgment by the staff authorized to admit him, but their exercise of judgment was specifically condoned by the regulations. "Florida's [statutory scheme] . . . gives state officials broad power *and little guidance* in admitting mental patients." *Zinermon*, 110 S.Ct. 988.

Such is emphatically not the case under the conditions assumed by the majority.

The factors which distinguish *Zinermon from Parratt/Hudson* do not pertain to this case. Moreover, there were adequate and prompt post-deprivation remedies available to Dr. Caine including a formal hearing, appeal to the board of trustees, and state judicial review.[7] Therefore, according to *Parratt/Hudson,* Dr. Caine was not deprived of procedural due process.

The majority have erred. I respectfully dissent.

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[7]He never used the remedies. As we stated in *Myrick* v. *City of Dallas,* 810 F.2d 1382, 1388 (5th Cir. 1987), a party may not refuse to invoke the process to which she is entitled and then claim a denial of constitutional procedural due process.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J89-0064(B)

CURTIS W. CAINE, JR., M.D. - - - - *Plaintiff*

v.

M. D. HARDY, WOODIE L. MASON, M.D., et al. - - - - - - *Defendants*

JUDGMENT

Pursuant to a Memorandum Opinion and Order entered this date, this action is hereby dismissed with prejudice.

So ORDERED this the 14th day of June, 1989.

(s) William H. Barbour, Jr.
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civ. A. No. J89-0064(B).

CURTIS W. CAINE, JR., M.D. - - - - *Plaintiff,*

v.

M. D. HARDY, WOODIE L. MASON, M.D., et al., - - - - - - *Defendants.*

June 14, 1989.

Anesthesiologist whose hospital privileges were suspended filed action under § 1983 against hospital and its officials alleging violation of due process and his First Amendment rights. On defendants' motion to dismiss or for summary judgment and on plaintiff's motion for leave to amend complaint, the District Court, Barbour, J., held that: (1) plaintiff had adequate postdeprivation remedies under Mississippi law; (2) plaintiff failed to establish violation of his First Amendment rights; and (3) plaintiff had no private cause of action under Health Care Quality Improvement Act.

Plaintiff's motion denied, defendants' motion granted.

1. Civil Rights Key No. 13.5(1)

Administrator and members of board of trustees, general medical staff executive committee and medical staff ad-hoc committees of Mississippi community hospital were persons acting under color of state law for purposes of § 1983 liability. Miss. Code 1972, § 41-13-15 et seq.,; 42 U.S.C.A. § 1983.

2. Constitutional Law Key No. 287.2(5)
Hospitals Key No. 6

Under Mississippi law, anesthesiologist whose hospital privileges were suspended was not denied his right to procedural due process, inasmuch as anesthesiologist was entitled to appeal action taken by hospital board of trustees to Mississippi chancery court. Miss. Code 1972, §§ 73-25-93(1), 73-25-95; U.S.C.A. Const. Amend. 14.

3. Civil Rights Key No. 13.9

Anesthesiologist's claim that hospital failed to follow its by-laws when it suspended his hospital privileges was not properly before district court in anesthesiologost's action under § 1983, insofar as anesthesiologist failed to appeal hospital's decision to Mississippi chancery court, as he was entitled to do. Miss. Code. 1972, §§ 73-25-93(1), 73-25-95; 42 U.S.C.A. § 1983.

4. Hospitals Key No. 6

Statutory period in which physician was entitled to appeal suspension of his hospital privileges to Mississippi chancery court did not violate Constitution, despite claim that it undreasonably truncated time within which to file action challenging suspension. Miss. Code 1972, § 73-25-27.

5. Jury Key No. 9

There is no constitutional guarantee of a right to a jury trial in civil cases.

6. Constitutional Law Key No. 90.1(1)
Hospitals Key No. 6

Anesthesiologist's allegations that his hospital privileges were improperly suspended because of his opposition to a hospital official in an election for chief of department medical staff and because of his opposition to proposed

exclusive contract between official's partnership and hospital for anesthesia services did not establish violation of anesthesiologist's First Amendment rights, insofar as anesthesiologist failed to establish that speech involved was a matter of public concern. U.S.C.A. Const. Amend. 1.

7. Federal Civil Procedure Key No. 851

Anesthesiologist was not entitled to amend complaint in his § 1983 action against hospital, inasmuch as complaint, as amended, was subject to dismissal. Fed. Rules Civ. Proc. Rule 15(a), 28 U.S.C.A.; 42 U.S.C.A. § 1983.

8. Hospitals Key No. 6

Health Care Quality Improvement Act did not provide disciplined anesthesiologist with private cause of action. Health Care Quality Improvement Act of 1986, § 402 et seq., 42 U.S.C.A. § 11101 et seq.

Paul M. Neville, Jackson, Miss., for plaintiff.
George Q. Evans, Jackson, Miss., for defendants.

MEMORANDUM OPINION AND ORDER

BARBOUR, District Judge.

This cause comes before the Court on the Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment and Plaintiff's Motion for Leave to Amend Complaint. Defendants argue that the Amended Complaint fails to state a claim upon which relief can be granted. For the reasons enumerated below, the Court holds that the Defendants' Motion to Dismiss should be granted and the Plaintiff's Motion for Leave to Amend Complaint should be denied.

I.

FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiff in this action, Curtis W. Caine, Jr., M.D. ("Caine"), alleges that he was a licensed physician practicing anesthesiology at Hinds General Hospital from 1983 until April, 1988, when his privileges at the hospital were suspended. The procedures used in the suspension of his privileges are the central focus of this lawsuit. Caine alleges that the suspension was conducted in violation of the Medical Staff By-laws, Rules and Regulations of Hinds General Hospital, of 42 U.S.C. § 1983, and of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101, *et seq.* In particular, Caine alleges that the suspension of his privileges at Hinds General Hospital violated his rights under the First, Fifth and Fourteenth Amendments to the United States Constitution based on the alleged denial of adequate notice of the charges brought against him and denial of an opportunity to be heard fully on those charges prior to the suspension of his hospital privileges. Caine also asserts that the various committees of the Hinds General Hospital medical staff who reviewed the charges were biased and prejudiced against him.

The Defendants named in this action are: Hinds General Hospital ("Hinds General"), members of its Board of Trustees, members of the Hinds General medical staff Executive Committee, members of certain medical staff ad-hoc committees, and the hospital administrator at Hinds General. Hinds General is a Mississippi community hospital established pursuant to Miss. Code Ann. § 41-13-15, *et seq.* (Cum. Supp. 1988), and thus a local government institution. Caine concedes that all individual Defendants were acting in their official capacities as officials, employees, or agents of Hinds General.

The Defendants have moved to dismiss this action pursuant to Federal Rule of Civil Procedure 126(b)(6), arguing that the Complaint and the proposed Amended Complaint fail to state a claim upon which relief can be granted. Alternatively, the Defendants urge the Court to grant summary judgment in their favor.

II.

CONCLUSIONS OF LAW

[1] Hinds General Hospital is a local government institution and the individual Defendants in this lawsuit were acting as local governmental officials, agents or employees of Hinds General. Thus, the Court finds that the individual Defendants were acting "under color of state law" for the purposes of establishing section 1983 liability. However, although Plaintiff has alleged action under color of state law, the Court holds that the Defendants' act do not subject them to liability under section 1983.

A. DUE PROCESS CLAIM

The gravamen of Caine's Complaint is his allegation that he was denied procedural due process in the suspension of his staff privileges at Hinds General. In *Schuster* v. *Martin*, Civil Action No. J88-0043(B), *aff'd*. 861 F.2d 1369 (5th Cir. 1988), this Court relied upon the ruling of the Court of Appeals for the Fifth Circuit in *Martin* v. *Dallas County, Texas*, 822 F.2d 553 (5th Cir. 1987) that: "[N]o constitutional claim may be asserted by a plaintiff who was deprived of his liberty or property . . . unless [state law] fails to afford an adequate post-deprivation remedy for their conduct." *Id*. at 555.

Here, as in *Schuster*, Caine has failed to allege that state law affords him with an inadequate post-deprivation remedy for the suspension of his privilege at Hinds Gen-

eral. Thus, the central consideration before the Court in this action is whether Caine had available adequate post-deprivation remedies which afforded him due process.

Mississippi's statutory scheme governing hospital peer review actions provides considerable protection to disciplined physicians while at the same time allowing hospitals to protect the interests of their patients. A hospital's authority to suspend privileges of a physician is found in Miss. Code Ann. § 73-25-93(1). Aggrieved physicians are provided a right of judicial appeal from adverse privilege actions by virtue of Miss. Code Ann. § 73-25-95 which provides:

> Any person against whom disciplinary action is taken pursuant to Sections 73-25-81 to 73-25-95 shall have the right to judicial appeal as provided in Section 73-25-27 relating to judicial appeal of Board decisions.

Under this section, Dr. Caine was entitled to appeal the action taken by the board of trustees to the Chancery Court just as if he were appealing from a decision of the state Board of Medical Licensure. Appeals from the Board of Medical Licensure are described in § 73-25-27 as follows:

> The decision of the Board of Medical Licensure [hospital Board of Trustees] revoking or suspending the license [privileges] shall become final thirty (30) days after so mailed or served unless within said period the licentiate [staff physician] appeals the decision to the Chancery Court, pursuant to the provisions hereof, and the proceedings in Chancery Court shall be conducted as other matters coming before the Court. All proceedings and evidence, together with exhibits, presented at such hearing before the Board of Medical Licensure in the event of appeal shall be admissible in evidence in said Court.

Under this statutory scheme, there is no question that Dr. Caine had the right to appeal by the adverse action taken against him by the hospital board of trustees to the Chancery Court. *E.g., State Bd. of Psych. Examiners* v. *Coxe,* 355 So.2d 669 (Miss. 1978). Had he appealed to that court under state law, the Chancery Court could have reviewed both the procedure employed and reasons for the suspension of Dr. Caine's privileges and ensured that Dr. Caine's rights were protected. Under that Court's general equity powers, appropriate injunctions and other equitable relief could have been entered as well.

[2, 3] By providing the right of appeal to Chancery Court, the state has assured that the system as a whole comports with the due process clause of the Fourteenth Amendment. Caine's allegations that the hospital failed to follow its by-laws is not a question properly before this Court. That question should have been raised before the state chancery court. As the Fifth Circuit stated in *Holloway* v. *Walker,* 790 F.2d 1170 (5th Cir. 1986): "[I]f the state system . . . does in fact provide the plaintiff with due process, no violation of the guarantee contained in the national constitution occurs merely because the official who randomly deprives him of liberty or property without the hearing required by state law has the power to grant such a hearing." *Id.* at 173.

In the face of adequate post-deprivation remedies under state law, this Court is of the opinion that there can be no violation of Caine's procedural due process rights. The Fifth Circuit implicitly agreed in *Schuster,* when it stated that: "[T]he district court's conclusion . . . that as a matter of law there could be no procedural due process violation since Mississippi provides adequate post-deprivation procedures, appears to be sound." *Id.* at 1374 n. 11. Thus, Plaintiff has failed to state a claim for violation of his rights of procedural due process under 42 U.S.C. § 1983.

Likewise, he has failed to state a claim for attorney's fees under 42 U.S.C. § 1988.

[4] Caine next asserts that the 30-day period for appeal to the Chancery Court found in Miss. Code Ann. § 73-25-27 (Cum. Cupp. 1988) unreasonably truncates the time within which Caine may file an action challenging the suspension of his medical privileges and thus violates the Supremacy Clause of Article VI of the United States Constitution. The Court holds that the 30-day time frame set forth in § 73-25-27 is not properly characterized as a statute of limitations. Rather, § 73-25-27 merely prescribes the period within which one may appeal the revocation or suspension of his license or medical privileges to the Chancery Court. Caine's challenge to the time period set out in the statutes is not well taken.

In this vein, § 73-25-27 is analogous to numerous other time periods set by Mississippi law, such as the period for apealing decisions of the Mississippi Workers' Compensation Commission, Miss. Code Ann. § 71-3-51 (1972), or for appealing Mississippi Chancery and Circuit Court judgments, Miss.R.Sup.Ct. 4. The Court discerns no constitutional flaw in the 30-day period provided in these various statutes nor in the 30-day period set forth in § 73-25-27.

[5] The Court also discounts Caine's sugestion that § 73-25-27 unconstitutionally denies him a right to trial by jury and to recover his attorney's fees. There is no constitutional guarantee of a right to a jury trial in civil cases nor to the recovery of attorney's fees. These issues are not well taken. In addition, the issue of due process *vel non* raised in this case would in all likelihood be considered a question of law for the Court, thereby eliminating the need for any jury.

B. FIRST AMENDMENT CLAIM

In his proposed Amended Complaint, Caine adds a First Amendment claim, apparently based on his belief that such a claim would lead inexorably to the conclusion that he has stated a valid section 1983 claim. In considering his proposed Amended Complaint, the Court holds that Caine has failed to state a violation of his First Amendment rights connected with the alleged improper suspension of his privileges at Hinds General.

[6] Even assuming, *arguendo*, that Caine's suspension was in some manner related to his opposition to Defendant M.D. Hardy in an election for chief of the medical staff Anesthesia Department and to Caine's opposition to the proposed exclusive contract between Hardy's partnership and Hinds General for anesthesia services, Caine has failed to establish that the speech involved was a matter of public concern. *See Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Bowman* v. *Pulaski County Special School District*, 723 F.2d 640 (8th Cir. 1983); *Harris* v. *Arizona Bd. of Regents*, 528 F.Supp. 987, 999 (D. Ariz. 1981).

Furthermore, Caine has failed to identify any hospital policy which adversely affected his First Amendment rights. From the record placed before the Court, it appears that Caine's criticism of and opposition to Defendant M. D. Hardy were personal in nature and not a matter of public concern. *See Herrington* v. *Mississippi Regional Medical Center*, 512 F.Supp. 1317, 1320-21 (S.D. Miss. 1981). Thus, in his proposed Amended Complaint, Caine has failed to state a claim upon which relief can be granted for any violation of his First Amendment rights.

[7] Finding that the Amended Complaint fails to state a claim upon which relief can be granted, the Court exercises its discretion pursuant to Federal Rule of Civil Pro-

cedure 15(a) to deny Caine's Motion for Leave to Amend Complaint. Numerous courts have ruled that leave to amend is properly denied when the complaint, as amended, is subject to dismissal. *See, e.g., Wedgeworth* v. *Fibreboard Corp.,* 706 F.2d 541 (5th Cir. 1983); *Bache Halsey Stuart Shields Inc.* v. *Tracy Collins Bank & Trust Co.,* 558 F.Supp. 1042 (D. Utah 1983).

C. THE HEALTH CARE QUALITY IMPROVEMENT ACT

Caine also alleges a cause of action under the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101, *et seq.* The Health Care Quality Improvement Act was not intended to supplant or modify existing state procedures. *See Gill* v. *Mercy Hospital,* 199 Cal.App.3d 889, 245 Cal.Rptr. 304, 312 (1988). The Health Care Quality Improvement Act "establishes a national clearing house of medical peer review and malpractice information and provides qualified immunity from certain federal and state laws for peer review actions taken in good faith." *Id.*

[8] The Health Care Quality Improvement Act was not intended to replace existing procedural safeguards already in place at public hospitals nor provide a disciplined physician with a private cause of action. Rather, the Act is intended to establish certain criteria by which to determine whether procedural safeguards adopted for peer review of health professionals are sufficient to cloak the individuals acting pursuant to those procedures with the immunity provided by the Act.

The Defendants in this action might use the Health Care Quality Improvement Act to claim immunity from this suit. The introductory language of the Health Care Quality Improvement Act clearly suggests that the purpose of Congress in enacting the statute was to address the "overriding national need to provide incentive and protection for phy-

sicians engaging in effective professional peer review." 42 U.S.C. § 11101(5).

D. CONCLUSION

It is clear from the face of the Complaint and the proposed Amended Complaint that Caine's claims are related primarily to procedural due process. The Court concludes that there has been no procedural due process violation in this case. Accordingly, the Court holds that the Defendants' Motion to Dismiss is well taken and should be granted. Insofar as Plaintiff's Amended Complaint also fails to state a claim upon which relief can be granted, Plaintiff's Motion for Leave to Amend Complaint will be denied.

IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss is granted and that the Plaintiff's Complaint is dismissed with prejudice. A separate judgment will be entered in accordance with the requirements of Rule 58 of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that the Plaintiff's Motion for Leave to Amend Complaint is denied.

SO ORDERED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J89-0064(B)

CURTIS W. CAINE, JR., M.D. - - - - *Plaintiff*

v.

M. D. HARDY, M.D., WOODIE L. MASON, M.D., JAMES STRONG, M.D., FRANK HOWELL, M.D., W. J. PATTERSON, M.D., GEORGE SMITH-VANIZ, M.D., H. D. BROCK, M.D., RICKY RUSSELL, M.D., JAMES MCILSWAIN, M.D., DON BUTTS, M.D., D. I. CARLSON, M.D., JOHN COURTNEY, M.D., ROBERT STRONG, M.D., DARILYNN WILSON, *M.D.*, as members of the Executive Committee and/or the two (2) *Ad Hoc* Anesthesia Department Investigating Committees of the Medical Staff of Hinds General Hospital, a hospital erected, owned and operated under Section 41-13-15 to 41-13-51 of the statutes of the State of Mississippi by the County of Hinds, Mississippi; and CECIL J. JAQUITH, DOROTHY WILLIAMS, JERRY N. BLAKENEY, BRUCE DEVINEY, F. O. WOODWARD, LINDA RAFF and GLEN HOLMES, as Trustees of Hinds General Hospital appointed pursuant to Section 41-13-29 of the Statutes of the State of Mississippi, ROBERT G. WILSON as Administrator of Hinds General Hospital, and HINDS GENERAL HOSPITAL, a hospital erected, owned and operated under Sections 41-13-15 to 41-13-51 of the Statutes of the State of Mississippi, by the County of Hinds, State of Mississippi, - *Defendants*

ORDER—Filed March 17, 1989

Plaintiff having moved to amend his original Complaint, and the Court having considered said Motion, and being otherwise sufficiently advised;

It Is Hereby Ordered

That said Motion be and the same is hereby Granted; and Plaintiff's original Complaint be and the same is hereby amended as set forth in Plaintiff's Motion for Leave to Amend Complaint.

Dated: March 17, 1989

(s) William H. Barbour, Jr.
Judge, United States District Court

(2)

No. 91-1007

In The

Supreme Court of the United States

October Term, 1991

CURTIS W. CAINE, JR., M.D.,

Petitioner,

versus

M.D. HARDY, M.D., WOODIE L. MASON, M.D., JAMES STRONG, M.D., FRANK HOWELL, M.D., W.J. PATTERSON, M.D., GEORGE SMITH-VANIZ, M.D., H.D. BROCK, M.D., RICKY RUSSELL, M.D., JAMES MCILWAIN, M.D., DON BUTTS, M.D., D.I. CARLSON, M.D., JOHN CORTNEY, M.D., ROBERT STRONG, M.D., DARILYNN WILSON, M.D., as members of the Executive Committee and/or the two (2) *Ad Hoc* Anesthesia Department Investigating Committees of the Medical Staff of Hinds General Hospital, a hospital erected, owned and operated under Sections 41-13-15 to 41-13-51 of the Statutes of the State of Mississippi by the County of Hinds, Mississippi; and CECIL J. JAQUITH, DOROTHY WILLIAM, JERRY N. BLAKENEY, BRUCE DEVINEY, F.O. WOODWARD, LINDA RAFF and GLEN HOLMES, as Trustees of Hinds General Hospital appointed pursuant to Section 41-13-29 of the Statutes of the State of Mississippi, ROBERT G. WILSON as Administrator of HINDS GENERAL HOSPITAL, and HINDS GENERAL HOSPITAL, a hospital erected, owned and operated under Sections 41-13-15 to 41-13-51 of the Statutes of the State of Mississippi, by the County of Hinds, State of Mississippi,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The Parties to the Proceeding are correctly set forth in the Petition.

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW, JURISDICTION AND CONSTITUTIONAL AND FEDERAL STATUTORY PROVISIONS INVOLVED

The Opinions Below, Jurisdiction, and Constitutional and Federal Statutory Provisions Involved are correctly set forth in the Petition. This case also involves the following state statutes and federal rule of civil procedure:

Mississippi Code Annotated Section 73-25-95

Any person against whom discliplinary action is taken pursuant to sections 73-25-81 to 73-25-95 shall have the right of judicial appeal as provided in section 73-25-27 relating to judicial appeal of board decisions. Provided, further, that no such person shall be allowed to practice medicine or deliver health care services in violation of any disciplinary order or action of the board while any such appeal is pending.

Mississippi Code Annotated Section 73-25-27

The Mississippi State Board of Medical Licensure after notice and opportunity for a hearing to the licentiate, is authorized to suspend or revoke for any cause named herein any license it has issued, or the renewal thereof, that authorizes any person to practice medicine, osteopathy, or any other method of preventing, diagnosing, relieving, caring for, or treating, or curing disease, injury or other bodily condition.

Such notice shall be effected by registered mail or personal service setting forth the particular reaons for the proposed action and fixing a date not less than thirty (30)

days or more than sixty (60) days from the date of such mailing or such service, at which time the licentiate shall be given an opportunity for a prompt and fair hearing. For the purpose of such hearing the board, acting by and through its executive office, may subpoena persons and papers on its own behalf and on behalf of licentiate, including records obtained pursuant to Section 1 of this act, may administer oaths and such testimony when properly transcribed, together with such papers and exhibits, shall be admissible in evidence for or against the licentiate. At such hearing licentiate may appear by counsel and personally in his own behalf. Any person sworn and examined as a witness in such hearing shall not be held to answer criminally, nor shall any papers or documents produced by such witness be competent evidence in any criminal proceedings against such witness other than for perjury in delivering his evidence. On the basis of any such hearing, or upon default of the licentiate, the Board of Medical Licensure shall make a determination specifying its findings of fact and conclusions of law.

A copy of such determination shall be sent by registered mail or served personally upon the licentiate. The decision of the Board of Medical Licensure revoking or suspending the license shall become final thirty (30) days after so mailed or served unless within said period the licentiate appeals the decision to the chancery court, pursuant to the provisions hereof, and the proceedings in chancery shall be conducted as other matters coming before the court. All proceedings and evidence, together with exhibits, presented at such hearing before the Board of Medical Licensure in the event of appeal shall be admissible in evidence in said court.

The Board of Medical Licensure may subpoena persons and papers on its own behalf and on behalf of the respondent, including records obtained pursuant to Section 73-25-28, may administer oaths, and may compel the testimony of witnesses. It may issue commissions to take testimony, and testimony so taken and sworn to shall be admissible in evidence for and against the respondent. The Board of Medical Licensure shall be entitled to the assistance of the chancery court or the chancellor in vacation, which, on petition by the board, shall issue ancillary subpoenas and petitions and may punish as for contempt of court in the event of noncompliance therewith.

Unless the court otherwise decrees, a license that has been suspended by the Board of Medical Licensure for a stated period of time shall automatically become valid on the expiration of that period and a license that has been suspended for an indefinite period shall become again valid if and when the Board of Medical Licensure so orders, which it may do on its own motion or on the petition of the respondent. A license that has been revoked shall not be restored to validity except: (1) after a rehearing by the Board of Medical Licensure, on petition of the respondent, for good cause shown, filed within ten (10) days, immediately following the service on him of the order or judgment of the Board of Medical Licensure revoking his license or (2) by order of the court, on petition as aforesaid. Any licentiate whose license becomes again valid after a period of suspension or after it has been restored to validity after a rehearing or by an order of the court, shall record it again in the office of the clerk of the circuit court of the county in which he resides in conformity with the requirements of Section 73-25-13.

Nothing in this chapter shall be construed as limiting or revoking the authority of any court or of any licensing or registering officer or board, other than the State Board of Medical Licensure, to suspend, revoke and reinstate licenses and to cancel registrations under the provisions of Section 41-29-311.

Federal Rule of Civil Procedure 10(c)

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

STATEMENT OF THE CASE

Petitioner's Statement of the Case misstates and omits numerous material facts. The Hinds General Hospital medical staff bylaws, rules and regulations, attached by the Petitioner to his Complaint as Exhibit "A" (R. 50-122)[1], provide for an investigation into the clinical competence of any medical staff member when initiated by a request for corrective action. (R. 74). Once such a request is made, an *ad hoc* investigation committee conducts an informal interview with the physician whose competence is in question. (R. 75). After reviewing the

[1] Cites are to the Fifth Circuit Record Excerpts (R.) unless otherwise indicated.

ad hoc investigating committee's report, the executive committee of the medical staff makes a recommendation to the hospital board of trustees. (R. 75-76).

The medical staff bylaws also provide for summary suspension "whenever [a physician's] conduct requires that immediate action be taken to protect the life of any patient(s) or to reduce the substantial likelihood of immediate injury or damage to the health or safety of any patient . . . . " (R. 76-77). A physician whose privileges have been summarily suspended is entitled to a prompt post-suspension hearing before an *ad hoc* hearing committee comprised of individuals who have not participated in the prior decision and who are not in economic competition with the affected practitioner. (R. 80-81). If after the *ad hoc* hearing committee makes its recommendation, the executive committee's recommendation is still adverse to the physician (R. 79), the physician is entitled to an appellate review by the hospital board of trustees. (R. 85-88). However, a physician who fails to appear without good cause for the scheduled *ad hoc* hearing is deemed to have waived the right to appellate review by the board of trustees. (R. 82). Under Mississippi law, a physician aggrieved by a hospital's decision to curtail clinical privileges may appeal the hospital's decision to chancery court pursuant to MISS. CODE ANN. § 73-25-95 and related statutes. (R. 351).

Petitioner's Complaint alleged that on April 4, 1988, the hospital administrator requested an investigation into Dr. Caine's anesthesia practices. (R. 9). On that same day, the chief of staff appointed an *ad hoc* investigating committee to review the relevant hospital chart (R. 124), as required by the bylaws. (R. 75). The bylaws required this

committee to provide Dr. Caine an interview prior to making its report to the executive committee. (R. 75). This interview was held on April 11. (R. 12).

A second interview requested by Dr. Caine was held on April 16. (R. 15). After completing its investigation, the investigating committee reported to the executive committee recommending that Dr. Caine's privileges be immediately suspended. The investigating committee detailed specific medical reasons justifying its recommendation. The committee found that Dr. Caine allowed a patient to die by failing to follow accepted anesthesia procedures and by thereafter abandoning the patient. (R. 134-135). Nowhere in the Complaint does Dr. Caine deny these findings.

The *ad hoc* investigating committee did not have the power under the bylaws to summarily suspend Dr. Caine's privileges. (R. 77). However, the medical staff executive committee was so empowered and on April 25, 1988, after receiving the investigating committee report, summarily suspended all of Dr. Caine's clinical privileges (R. 17, 141-143). Dr. Caine was promptly notified of this decision and advised of his right to request a hearing within thirty days before an *ad hoc* hearing committee. (R. 144). On May 4, 1988, he requested such a hearing and was promptly notified by letter of the date, time and place of the hearing as well as the composition of the hearing committee. (R. 18-19). In the same letter, he was given detailed notice of the charges against him. (R. 146-147).

The bylaws entitled Dr. Caine to a hearing within seven days from the date of the request. (R. 80). However,

Dr. Caine twice requested a continuance of the scheduled hearing, both of which were granted. (R. 21, 23). On June 13, Dr. Caine agreed not to exercise clinical privileges at the hospital pending a final decision by the board of trustees. (R. 228). Prior to the rescheduled third hearing date, Dr. Caine requested the recusal of two committee members. (R. 38-39). This request was also granted. (R. 39). This newly formed hearing committee consisted of physicians who are not Defendants in this lawsuit, who did not participate in the investigating or executive committee decisions, who were not in economic competition with Dr. Caine, and against whom Plaintiff has not alleged any specific facts supporting his claim of bias. (R. 39-40). Nevertheless, in the belief that "no member of the Medical Staff of Hinds General Hospital could serve on an *Ad Hoc* Hearing Committee" (R. 42), Dr. Caine requested that all members of the hearing committee recuse themselves and that the hearing committee be comprised of physicians from outside the medical staff at Hinds General Hospital (R. 43), although the bylaws did not provide for such a procedure. After this request was refused (R. 44), Dr. Caine, on advice of counsel, refused to appear before the *ad hoc* hearing committee to defend himself. (R. 45). No judicial appeal pursuant to § 73-25-95 was taken.

SUMMARY OF THE ARGUMENT

The questions presented in the petition arise only if one rejects the *en banc* Fifth Circuit's interpretation of the Complaint in favor of Petitioner's interpretation. The statement of the case contained in the Petition cannot be

reconciled with the summary of the facts given in the *en banc* Fifth Circuit's opinion. This irreconcilable difference results not from any error on the part of the Court below but from Petitioner's decision to ignore the plain language of the Complaint and the exhibits which he attached to his Complaint, which are part of that Complaint for all purposes. *Fed. R. Civ. P.* 10(c). Such a dispute over the reading of a complaint or the effect of exhibits is certainly not grounds for exercising this Court's power of supervision.

Moreover, several sound reasons justify denying the Petition. First, the Fifth Circuit's principal holding in this case was based upon the traditional *Matthews* balancing test. This due process analysis presents no novel or undecided issue of law and is inappropriate for review by this Court under the facts presented here. Second, there exists no conflict among the circuits as to any question of law presented in this case, including the interpretation of this Court's decision in *Zinermon v. Burch*, 494 U.S. ___, 108 L.Ed.2d 100, 110 S.Ct. 975 (1990). Indeed if *Zinermon* has any clear message, it is the reaffirmance of this Court's prior precedent holding that the necessity of quick action by the state justifies the deprivation of property so long as the state provides a prompt post-deprivation procedure. This need for quick action under exigent circumstances is the touchstone of the *en banc* Fifth Circuit's decision and is consistent with this Court's decisions in *Zinermon* and *Parratt v. Taylor*, 451 U.S. 527 (1981). The remaining issues in this case are well established and were appropriately addressed by the courts below.

ARGUMENT

REASONS FOR DENYING THE WRIT

1. The *En Banc* Fifth Circuit's Principal Holding Does Not Present an Issue Worthy of Certiorari

The *en banc* Fifth Circuit's principal holding was that under *Matthews v. Eldridge*, 424 U.S. 319 (1976), the complaint failed to state a claim for denial of procedural due process.[2] In *Matthews*, this Court required a balancing of the following three factors in determining whether the particular procedure employed is constitutionally adequate: (1) the private interest that will be affected; (2) the risk of an erroneous deprivation of the interest; and (3) the government's interest. Citing *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908), the lower court in this case recognized that in applying the *Matthews* balancing test, "the necessity of quick action" by the state will justify the summary deprivation of property if followed by adequate post-deprivation procedures. In such cases, the state's powerful interest clearly outweighs any private interest and the risk of an erroneous deprivation. For this reason, the court below found that exigent circumstances justified the summary suspension of Dr. Caine's hospital privileges, that Dr. Caine was provided adequate post-suspension procedures, and that as a result, the Petitioner's Complaint failed to state a

---

[2] The complaint alleged only claims for denial of procedural due process and, as amended, alleged claims for denial of the First Amendment right of free speech. No claim for denial of substantive due process was alleged.

procedural due process claim upon which relief could be granted.

The medical reasons given by the hospital as justification for the summary suspension of Dr. Caine's hospital privileges are contained in documents, attached to the Complaint as exhibits. Exhibit "I" to the Complaint provides clear evidence of Dr. Caine's incompetence and his danger to patients. In it, a committee member stated:

> More frightening than a lack of knowledge is the lack of concern for his patient's welfare and a denial of responsibility for his patient's welfare that, in my opinion, are demonstrated by the following items. Dr. Caine evidently was aware, at the time he anesthetized his patient, that cricoid pressure was and is the standard of practice in a patient at risk for regurgitation of gastric contents. He made the decision not to use cricoid pressure because he felt that the nurses in the operating suite were incapable of giving cricoid pressure correctly. In my experience, this has not been the case. My impression from our interview was that he saw no reason to change this aspect of his anesthesia technique.
>
> Even lack of the knowledge necessary to correctly interpret the data the patient monitors were showing cannot justify leaving this patient under the care of the nurses in the recovery room without a physician responsible for the patient close by. After he left the recovery area, he did not see the patient or call to check on his status again. When told by telephone that the patient had arrested, he was not concerned enough to return to the hospital to ascertain what had occurred.

(R. 131). Despite Petitioner's current assertions, nowhere in his fifty-page Complaint does Dr. Caine deny these findings. Nowhere does the Complaint dispute that he was guilty of incompetence.

Furthermore, exhibits to a complaint are a part thereof for all purposes and may be considered by the court on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Fed. R. Civ. P.* 10(c); *see Zinermon*, 108 L.Ed.2d at 109; *United States v. Wood*, 925 F.2d 1580, 1582 (7th Cir. 1991); *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986); *Sullivan v. United States*, 788 F.2d 813, 815 (1st Cir. 1986). Thus, the lower court was eminently correct when it determined that because of the necessity of quick action in order to protect against further patient deaths, no further predeprivation procedures were constitutionally required.

The court was likewise correct when it determined that Dr. Caine was provided all the postdeprivation process to which he was entitled and that the intricacies of *Zinermon* need not even be reached. In *Zinermon*, this Honorable Court expressly excepted cases such as this one from its holding. The Court first emphasized that "*Parratt* is not an exception to the *Matthews* balancing test, but rather an application of that test to the unusual case in which one of the variables in the *Matthews* equation – the value of the predeprivation safeguards – is negligible in preventing the kind of deprivation at issue." *Zinermon*, 108 L.Ed.2d at 116. The Court then reaffirmed its stance that "[1] the necessity of quick action by the state *or* [2] the impracticality of providing any predeprivation process" justify the use of postdeprivation procedures alone. *Id.* at 115 (emphasis added). *Zinermon*

concerns only the second category of cases – those in which predeprivation procedures are impractical. This case, however, falls within the first category of cases in which there is a necessity of quick action and for this reason *Zinermon* does not apply. Since *Zinermon* is inapplicable, the clearly adequate postdeprivation procedures available to Dr. Caine satisfied due process as a matter of law. *Parratt*, 451 U.S. at 538-39.

In sum, the principal holding of the court below was based upon a traditional due process analysis using the *Matthews* balancing test, which is wholly unaffected by *Zinermon*. The sound reasoning employed by the lower court would compel the Court to affirm the decision even if it disagreed with the Fifth Circuit's interpretation of *Zinermon*. Thus, the Petition should be denied.

2. The Facts Alleged in the Complaint Do Not Present the Substantive Issues Raised in the Petition

The entire Petition is premised upon Petitioner's incorrect reading of the Complaint – a reading expressly rejected by an overwhelming majority of the *en banc* Fifth Circuit Court of Appeals. Only if the Court reviews the fifty-page Complaint along with its voluminous exhibits and then rejects the Fifth Circuit's reading of these documents would this Court even reach the substantive issues stated in the Petition.

First, Petitioner's principal argument is that the lower court incorrectly interpreted *Zinermon*. This argument is in turn based upon the premise that the exhibits to the Complaint should not have been considered. As

discussed above, the court was absolutely correct in reviewing these materials as they were a part of the Complaint and the record on appeal for all purposes. This Court employed this exact approach in *Zinermon* when it analyzed the exhibits to the complaint in detail. *Zinermon*, 108 L.Ed.2d at 109. The exhibits to the Complaint show that Dr. Caine was guilty of gross incompetence which led to the death of a patient undergoing surgery at Hinds General Hospital. Nowhere in Dr. Caine's Complaint did he refute these medical findings. As a result, it was uncontradicted that the summary suspension of his clinical privileges was justified.

Second, the correctness of the decision to summarily suspend is "beside the procedural due process point." *Amsden v. Moran*, 904 F.2d 748, 755 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991); *see Carey v. Piphus*, 435 U.S. 247 (1978). Procedural due process addresses only the procedures afforded and not the correctness of the deprivation itself. Consequently, whether the decision to summarily suspend Dr. Caine's privileges was correct is irrelevant under procedural due process analysis, and whether the court below properly considered the exhibits containing the reasons for the summary suspension should not even be an issue in this case.

Third, procedural due process requires only that the state provide a person notice of charges and an opportunity to be heard at an appropriate time. Petitioner's statement of the case fails to point out that the Complaint clearly alleged that Dr. Caine was offered a full hearing before a separate *ad hoc* hearing committee, which he refused. (R. 40). Dr. Caine was advised of his right to this hearing immediately after imposition of the summary

suspension. (R. 144). After requesting a hearing (R. 145), he received a detailed description of the charges made against him. (R. 146-47). Subsequently, he requested and was granted continuances of this hearing on two different occasions. (R. 148-49, 229). Additionally, he requested and was granted a special appearance before the executive committee. (R. 228). At this time, he "agreed not to exercise his clinical privileges of performing anesthesia at Hinds General Hospital pending final resolution and outcome of this matter . . . . " (R. 228). After agreeing that the *ad hoc* hearing would be held on September 21, 1988 (R. 273), Dr. Caine filed a motion requesting that two members of the *ad hoc* hearing committee recuse themselves. (R. 276-79). After this request was granted (R. 39), Dr. Caine filed a second motion requesting no less than all members of the Hinds General Hospital medical staff recuse themselves. (R. 281). Dr. Caine insisted upon an outside hearing committee, a procedure not contemplated by the medical staff bylaws. (R. 81) and not required by any applicable law. When the executive committee denied his request for an outside hearing committee, Dr. Caine declared that no member of the Hinds General medical staff could properly sit on the *ad hoc* hearing committee and, on advice of counsel, refused to appear and defend the charges made against him or present evidence of the alleged bias. (R. 45). At that point, Dr. Caine was deemed to have waived his right to a hearing and appellate review. (R. 79-80). Without any evidence in the record to contradict the findings of the investigating and executive committees, the hospital board of trustees had no choice but to accept the executive committee's recommendation that the suspension be continued. (R. 292).

In order to challenge the bias of a hearing committee, a plaintiff must show from the hearing record actual bias. *Laje v. Thomason General Hosp.*, 564 F.2d 1159, 1162 (5th Cir. 1977). Since Dr. Caine refused to appear before the *ad hoc* hearing committee, there is no record from which to find that the hearing committee was biased in any way. Thus, there is absolutely no basis on which to find that Dr. Caine was deprived of his right to a fair and impartial hearing.

Read fairly, the allegations of the Complaint present a case in which a physician guilty of gross incompetence was provided more than adequate procedures to safeguard against any erroneous deprivation. Whether the Fifth Circuit correctly interpreted this Court's decision in *Zinermon*, it was eminently correct in determining that Dr. Caine was provided all the process to which he was entitled under *Matthews*. The Petitioner's sole challenge to this legal determination is an attack on the lower court's consideration of the exhibits to his Complaint. Such consideration was appropriate and, even if inappropriate, is unworthy of certiorari.

3. The Petition Presents No Conflict Among the Various Circuit Courts of Appeal.

The *en banc* Fifth Circuit's interpretation of *Zinermon* in this case is consistent with every circuit court decision interpreting *Zinermon*. This Court denied certiorari in several of these cases. *See Schroeder v. City of Chicago*, 927 F.2d 957 (7th Cir. 1991); *Coriz v. Martinez*, 915 F.2d 1469 (10th Cir. 1990); *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474 (7th Cir. 1990); *Easter House v.*

Felder, 910 F.2d 1387 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 783 (1991); *Fields v. Durham*, 909 F.2d 94 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 786 (1991); *Amsden v. Moran*, 904 F.2d 748 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991); *Katz v. Klehammer*, 902 F.2d 204 (2d Cir. 1990); *Valenti v. Cohen*, No. 88-6193 (E.D. Pa. April 25, 1990), *aff'd.*, 904 F.2d 697 (3d Cir. 1990). The only circuit court cases that Respondents have found which have relied on *Zinermon* in finding a sufficiently alleged procedural due process claim have done so where no exigent circumstances justifying quick action existed. *See, e.g., Ezekwo v. NYC Health & Hosps. Corp.*, 940 F.2d 775, 784 (2d Cir. 1991); *Plumer v. Maryland*, 915 F.2d 927, 929-31 (4th Cir. 1990).

In addition, the circuits agree that it is appropriate to consider exhibits to a complaint when ruling on a motion to dismiss pursuant to Rule 12(b)(6), *Wood*, 925 F.2d at 1582; *Morton*, 795 F.2d at 187; *Sullivan*, 788 F.2d at 815; *AMFAC Mortgage Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 429-30 (9th Cir. 1978), an approach employed by this Court in *Zinermon*.

Finally, the circuits have uniformly applied this Court's rule that statements made in the workplace by public employees are protected by the First Amendment only if they constitute matters of public concern. *See, e.g., Smith v. Cleburne County Hosp.*, 870 F.2d 1375, 1382 (8th Cir.), *cert. denied*, 110 S.Ct. 142 (1989); *Zaky v. United States Veterans Admin.*, 793 F.2d 832, 839 (7th Cir.), *cert. denied*, 479 U.S. 937 (1986); *Davis v. West Community Hosp.*, 755 F.2d 455, 461-62 (5th Cir. 1985).

The uniformity among the circuits, and this Court's previous denial of certiorari to consider other circuit

court decisions interpreting *Zinermon* in a similar manner, strongly suggest the correctness of the Fifth Circuit's decision in this case and the undesirability of granting certiorari to review that decision.

4. The Decision of the Court Below Does Not Conflict with Any Decision of This Court

The decision of the *en banc* circuit court below is consistent with the decisions of this Court. Long before *Parratt, Hudson v. Palmer*, 468 U.S. 517 (1984), and *Zinermon*, this Court decided the case of *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908), in which the owner of food products which were seized and condemned by the Chicago Board of Health filed procedural due process claims against the city for failing to provide a predeprivation hearing. *Id.* at 315. Relying on the need for quick action in order to protect the health and welfare of potential consumers of the seized food, the Court found that the plaintiff's bill did not state a cause of action for the denial of due process even though the plaintiff contended that there was no emergency justifying the seizure without first providing the predeprivation hearing. *Id.* at 319, 321.

In *Zinermon*, this Court reaffirmed this sound law, stating that the "necessity of quick action" by the state justifies the lack of predeprivation procedures so long as the state provides adequate postdeprivation procedures or remedies. *Zinermon*, 108 L.Ed.2d at 115 (quoting *Parratt*, 451 U.S. at 539). Under *Zinermon*, where quick action is necessary, the three preconditions for application of the *Parratt/Hudson* doctrine – unpredictability, impossibility

and authorization – are not even reached. Thus, regardless of how those factors may be considered, the Fifth Circuit's decision below is consistent with *Zinermon* and need not be disturbed.

In *Zinermon*, the petitioner, Burch, was admitted as a voluntary patient for treatment at a psychiatric hospital, even though he was incompetent to give informed consent to his admission. *Zinermon*, 108 L.Ed.2d at 111. The relevant Florida statute contained procedures for voluntary, involuntary and "short-term *emergency*" admission. *Id.* at 111 (emphasis added). The latter procedure, which is analogous to the summary suspension procedures employed in this case, provided for immediate institutionalization followed by a prompt post-admission hearing. *Id.* This Court had no criticism of Florida's statutory scheme for emergency admission, and thus *Zinermon* offers no support for Dr. Caine's allegations that the summary suspension procedures here were in some way constitutionally deficient.

Furthermore, the Petitioner here does not argue a violation of his substantive due process rights but limits his claims to procedural due process. This Court has previously established that a procedural due process claim does not hinge upon whether the deprivation was erroneous but whether the procedure that resulted in the deprivation was constitutionally adequate. *Carey v. Piphus*, 435 U.S. 247, 266 (1978). As a result, even if cert were granted, whether the summary suspension was erroneous would not be an issue.

In short, in stark contrast to *Zinermon* where there was no evidence that Burch posed a danger to others, the

facts here clearly showed that Dr. Caine posed great danger to patients whose lives were entrusted to him. The summary suspension procedures employed provided Dr. Caine the additional safeguard the Supreme Court found lacking in Florida's voluntary admission procedures – an adequate timely hearing.

Finally, Petitioner's assertion that the *en banc* Fifth Circuit "simply ignored *Zinermon* and relied upon nonfacts" (Petition, p. 27) is baseless. The court below carefully analyzed *Zinermon* and found (1) Dr. Caine was provided all the process which he was due, and (2) *Zinermon* does not alter this result. Petitioner interprets *Zinermon* as resurrecting procedural due process claims where previously there were none. This approach defies common sense and is unsupported in law. After careful analysis, the Fifth Circuit held alternatively that, even if Dr. Caine had stated a procedural deficiency for the initial deprivation of his privileges, the adequate postdeprivation remedies were ample to protect his rights. The court found simply that the facts of this case substantially differed from those in *Zinermon*. Thus, its alternative holding, though in essence dictum, was consistent with the decisions of this Court.

5. The Dismissal of Petitioner's Alleged First Amendment Claims Is Unworthy of Certiorari

Petitioner's argument with regard to his alleged First Amendment claims is that he had an absolute right to amend his Complaint under *Fed. R. Civ. P.* 15(a). He fails to point out that after filing his motion for leave to amend

and having it granted, the Defendants filed a supplemental motion to dismiss the amended Complaint. (R. 345-46). Defendants asserted that Plaintiff's amendment to his Complaint failed to state a claim upon which relief could be granted since the "speech" alleged was not a matter of public concern and, thus, not protected by the First Amendment. Although the district court subsequently reversed itself and denied Dr. Caine's proposed amendment, it treated the Complaint as amended and addressed the substantive issue of whether the amended complaint stated a claim for violation of Dr. Caine's First Amendment rights. Likewise, the *en banc* Fifth Circuit Court of Appeals treated the Complaint as amended and addressed the substantive issue of whether Dr. Caine's amended complaint failed to state a claim upon which relief could be granted. Thus, if error at all, the district court's denial of Dr. Caine's motion to amend the Complaint was clearly harmless. Certainly, such a procedural matter does not justify the exercise of this Court's power of supervision, much less Petitioner's personal attack on the lower courts. (Petition, p. 19).

The Complaint states that Dr. Caine opposed the alleged exclusive contract because it would "injure and infringe upon his own anesthesia practice in Hinds General Hospital." (R. 7-8). His objections to this contract were based solely upon his own personal finances and ambitions. Nowhere does the Complaint allege that the awarding of the alleged contract would in any way detrimentally affect the quality of patient care at Hinds General. Likewise, the Complaint does not allege that the election of Dr. Hardy as anesthesia department head would in any way affect the public concern. Dr. Caine's

amendment to his Complaint added nothing to these allegations except the insertion of the words "First Amendment." (R. 338).

This Court has well defined the scope of protection provided by the First Amendment to statements made within the workplace by public employees. *See Connick v. Myers*, 461 U.S. 138 (1983). Because, Dr. Caine's statements did not address a matter of public concern, they are not protected by the First Amendment. This Court need not grant certiorari in order to revisit this issue where no conflict exists.

CONCLUSION

The Petitioner disagrees with the *en banc* Fifth Circuit's reading of the Complaint. This disagreement is the *sine qua non* of his Petition for a Writ of Certiorari and does not justify review of the lower court's decision by this Court. The principal holding of the court below was based upon a traditional procedural due process analysis employing the *Matthews* balancing test. Such an approach has long been established and countenanced by this Court and need not be revisited at this late date. No conflict has arisen among the circuits which would justify this Court revisiting its decision in *Zinermon*, and no conflict exists between the decision of the court below in this case and prior decisions of this Supreme Court. Finally, the substantive issues underlying the Petitioner's alleged First Amendment claims have long since been clarified by this Court and implemented by the lower

circuit courts of appeal. No novel or undecided First Amendment issue is presented in this case.

Accordingly, Respondents respectfully request this Court to deny the Petition for a Writ of Certiorari.

This the 25th day of February, 1992.

Respectfully submitted,

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